(26,897)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No. 276.

ROBERT F. STROUD, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

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1 In the District Court of the United States for the District of Kansas, First Division.

No. 4287

ROBERT F. STROUD, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Citation.

The United States of America to the United States of America, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the city of Washington, D. C., 30 days from and after the day *of* this Citation bears date, pursuant to a Writ of Error, filed in the Clerk's office of the District Court of the United States for the First Division of the Judicial District of Kansas, wherein Robert F. Stroud, is Plaintiff in Error, and you are defendant in Error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said Writ of Error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable John C. Pollock, Judge of the District Court of the United States for the District of Kansas, this 24th day of Sept., in the year of our Lord One Thousand Nine Hundred and Eighteen.

JOHN C. POLLOCK,
United States District Judge for the District of Kansas.

Service of the within Citation accepted by the United States this — day of ——, 1918.

—— ——.

[Endorsed:] No. 4287. Robert F. Stroud, Plaintiff in Error, vs. United States of America, Defendant in Error. Citation. Original. Kimbrell & O'Donnell, Attorneys for Plaintiff in Error.

2 In the District Court of the United States for the District of Kansas.

No. 4287.

ROBERT F. STROUD, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

STATE OF KANSAS,
County of Sedgwick, ss:

On this 24 day of September, 1918, personally appeared before me Frank L. Campbell, Clerk of said Court, within and for the District of Kansas, Martin J. O'Donnell and made oath that he delivered a copy of the within Citation to Defendant in Error by delivering same to Fred Robertson, Esquire, the District Attorney for the United States for the District of Kansas, who represented Defendant in Error, at the trial of this cause, and still represents Defendant in Error, on this 24 day of September, 1918.

[Seal of the District Court of the United States, District of Kansas, Second Division, 1890.]

MARTIN J. O'DONNELL.

Subscribed and sworn to before me this 24 day of September, 1918.

My commission expires ——, 19—.

F. L. CAMPBELL,
Clerk of the United States — Court for the District of Kansas.

[Endorsed:] No. 4287. United States of America, Plaintiff, vs. Robert F. Stroud, Defendant. Affidavit of Service of Citation. Filed Sept. 24, 1918. F. L. Campbell, Clerk. Original. Kimbrell & O'Donnell, Attorneys for Defendant in Error.

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the District Court of the United States for the First Division of the Judicial District of Kansas, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, at the Special May Term, 1918, thereof, between the United States of America, and Robert F. Stroud, a manifest error hath happened, to the great damage of the said Robert F. Stroud, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in his behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the said record and proceedings aforesaid, at the city of Washington and filed in the office of Clerk of the United States Supreme Court on or before the 24th day of October, 1918, to the end that the record and proceedings aforesaid being inspected, the United States Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 24th day of Sept., in the year of our Lord, One Thousand Nine Hundred Eighteen.

Issued at office in the City of Leavenworth with the seal of the District Court of the United States for the First Division of the Judicial District of Kansas, dated as aforesaid.

[Seal of District Court U. S., District of Kansas, 1861.]

F. L. CAMPBELL,
Clerk District Court United States, First Division of Judicial District of Kansas.

Allowed by—
JOHN C. POLLOCK,
Judge.

Return to Writ.

UNITED STATES OF AMERICA,
First Division of the Judicial District of Kansas, ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said District Court, at office in the City of Topeka, this 30th day of December, A. D. 1918.

[Seal of District Court U. S., District of Kansas, 1861.]

F. L. CAMPBELL,
Clerk of said Court.

[Endorsed:] No. 4287. United States of America, Plaintiff, vs. Robert F. Stroud, Defendant. Writ of Error. Filed Sept. 24, 1918. F. L. Campbell, Clerk. Original. Kimbrell & O'Donnell, Attorneys for Defendant.

4 *Indictment.*

THE UNITED STATES OF AMERICA,
The District of Kansas, First Division, ss:

In the District Court of the United States within and for the First Division of the District of Kansas, at the April Term Thereof, A. D. 1916, Sitting at Topeka.

The grand jurors of the United States, within and for the First Division of the District of Kansas, sitting at Topeka, Kansas, duly impaneled, sworn and charged at the term aforesaid of the court aforesaid, on their oath find, charge and present that one Robert F. Stroud, on or about the twenty-sixth day of March, A. D. 1916, in said division of said district, and within the jurisdiction of said court, in the County of Leavenworth, state of Kansas, and at and within the prison walls of the United States Penitentiary at Leavenworth, Kansas, said place then and there and theretofore and ever since being under the exclusive jurisdiction of the United States, then and there being, did then and there knowingly, willfully, purposely, unlawfully, feloniously, deliberately, premeditatedly, and of his malice aforethought, with the intent to kill and murder one Andrew F. Turner, make an assault upon him, the said Andrew F. Turner, with a certain deadly weapon, to-wit, a certain knife with a sharp edge and pointed blade of several inches in length, which he, the said Robert F. Stroud, in his hand then and there had and held, and did then and there unlawfully, willfully, purposely, feloniously, deliberately, premeditatedly, and of his malice aforethought, with the intent as aforesaid to kill and murder said Andrew F. Turner, strike, cut, stab and wound the said Andrew F. Turner at, upon and into the body and breast of him, the said Andrew F. Turner, then and there and thereby giving to him, the said Andrew F. Turner,
5 in and upon the body and breast of him, the said Andrew F. Turner, one mortal wound of the width of about one (1) inch and the depth of about five (5) inches, from which said wound he, the said Andrew F. Turner, did then and there instantly die.

And the grand jurors aforesaid, on their oath aforesaid, do further find, charge and present that at the time and place and in the manner and by the means aforesaid, the said Robert F. Stroud, him, the said Andrew F. Turner, did then and there purposely, knowingly, willfully, unlawfully, feloniously, deliberately, premeditatedly and of his malice aforethought, kill and murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

FRANCIS M. BRADY,
Assistant U. S. Attorney.

A true bill.
W. C. HARVEY,
Foreman.

Witnesses: J. M. Purcell, Capt. of the day watch, Fed. Pen., Leavenworth, Ks., Thos. W. Morgan, Worden, Fed. Pen., Leavenworth, Ks., K. F. Smith, Prison Guard, Fed. Pen., Leavenworth, Ks., E. W. Titel, Guard, Fed. Pen., Leavenworth, Ks., A. H. Boyer, Guard, Fed. Pen., Leavenworth, Ks., D. Whitlatch, Guard, Fed. Pen., Leavenworth, Ks., Howard Beck, Guard, Fed. Pen., Leavenworth, Ks., Edward Myers, U. S. Prison, Leavenworth, Ks., A. J. Renoe, Deputy Warden, Leavenworth, Ks., Howard Walsh, Fed. Pen., Leavenworth, Ks., Oscar E. Olsen, Fed. Pen., Leavenworth, Ks., Wm. Hall, Fed. Pen., Leavenworth, Ks., P. E. White, Fed. Pen., Leavenworth, Ks., W. J. Pollard, Fed. Pen., Leavenworth, Ks., John Burton, Fed. Pen., Leavenworth, Ms., Charles F. Prevost, Fed. Pen., Leavenworth, Ks., Harry Gordon, Fed. Pen., Leavenworth, Ks.,—Rassmusen, Fed. Pen., Leavenworth, Ks., W. S. Rohobold, U. S. Prison, Leavenworth, Ks.,
Dr. Alfred F. Yohe, Leavenworth, Ks., Mrs. Ida Turner, Des
6 Moines, Iowa, Riley Costello, Leavenworth, Ks., Thomas D.
Elliott, Leavenworth, Ks., C. C. Jackson, Topeka, Ks., Frank Albert, Jr., Leavenworth, Ks., Owen P. Halligan, Bee Washington, R. G. Brown, Guard, Leavenworth, Kansas, John E. Roesch, Leavenworth, Ks., Marshal Tyson, Leavenworth, Ks., S. O. Alexander, Leavenworth, Ks.

Endorsed: No. 4287. United States District Court, District of Kansas, First Division. The United States of America vs. Robert F. Stroud. Indictment: Vio. Sec. 273 and 275 Federal Penal Code of 1910. Penalty: Death. Filed April 13th, 1916. Morton Albaugh, Clerk.

Be it remembered, that at a Special Term of the District Court of the United States of America for the District of Kansas, begun and held at the City of Leavenworth in said District, on Monday, the 22nd day of May, 1916, the following proceedings, among others, were had, and appear of record in the words and figures as follows:

Journal Entry of Arraignment and Plea.

Now on this 22nd day of May, 1916, come the parties hereto, the plaintiff being present by Fred Robertson, United States Attorney and Francis M. Brady, Assistant United States Attorney, the defendant, Robert F. Stroud, being present in his own proper person and by L. C. Boyle and I. B. Kimbrell, his attorneys. Thereupon said defendant through his attorneys waives arraignment upon the indictment herein and enters his plea of not guilty thereto. Thereupon to try the issues submitted to it comes the following jury, to-wit: C. N. Prouty, W. J. Stroble, H. A. Schwandt, William Tomson, Carl P. Eresch, R. Cameron, C. A. Clewell, Wilbur J. Mansfield, T. A. Sharp, E. A. Hood, W. B. Penny and B. P. Davis, twelve good and lawful men of the body of the first division of the district of Kansas, who being duly empaneled and sworn to well and truly try the issues submitted to it and a true verdict give according to the law and the

evidence, the trial of said case is proceeded with and the hour
7 of adjournment having arrived, and the trial of said case not being concluded, the jury is admonished of its duties by the court and the further hearing of said case is postponed until tomorrow morning at 10 o'clock.

Entered in Journal "U" at page 77.

8 *Assignment of Errors (First Trial).*

Now comes into court here said defendant, Robert F. Stroud, in his own proper person, and by his attorney, and says that in the record and proceedings aforesaid there is manifest error, in this:

1. That the indictment aforesaid and the matters therein contained are not sufficient in law to warrant the judgment against him now given, or to convict him of the charge set forth in said indictment.

2. The court had no jurisdiction in this case, for the reason that there was no legal evidence showing that the place where it was charged that the offense named in the indictment was committed, *and* was within the exclusive jurisdiction of the United States.

3. This court was without jurisdiction in this case, for the reason that the crime charged in the indictment, if committed by the defendant, was committed within the State of Kansas, and at a place under the jurisdiction of the State of Kansas.

4. The court charged the jury as follows:

In the District Court of the United States for the District of Kansas, First Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

ROBERT F. STROUD, Defendant.

Charge of the Court.

(POLLOCK, *J.*:)

Gentlemen of the jury, with most commendable care, attention and patience, in this overcrowded, heated court room, you have now listened to the trial of this case until that point is reached whereat it is the duty of the court to charge you as to the law which
9 will govern you in your deliberations upon your verdict in this case.

Preliminary, gentlemen of the jury, let me say, you understand in courts of justice in this country, under our form of government, in cases tried before the court and a jury, such as is this case, the responsibility for the due and proper administration of justice under

the law is equally divided between the jury and the court. While that responsibility is equal, and must, under the law, be equally borne, yet the nature of the duty required on the one hand, and the other, under the law, is not the same. It is the exclusive duty of the court to declare the law of the case, and the jury must take the law precisely as declared by the court, and for the reason, if any mistake be made in a matter of law, that is the mistake of the court, for which the jury is not responsible. On the other hand, the jury, and the jury alone, is the exclusive judge of the weight of the evidence, the credibility to be given all witnesses and the facts proven on the trial of the case, and if any mistake is made in administering justice by the jury in finding the facts in the case, that is a mistake for which the jury, and the jury alone, must be held responsible.

Whenever, and so long, under our form of government as our laws are so administered in our courts of justice, that is, the court shall honestly, intelligently, fearlessly declare the law and so long as our juries, laying aside every other thought except the doing of equal and exact justice under the law, shall, from the evidence just as honestly, fearlessly and intelligently find the facts and unite the facts as found in the law as declared by the court in their verdict, just so long will we have protection under the laws of our country, and just so long we will as citizens have our property, our liberty and our lives protected. But, if, for any reason, either the court or the jury shall become false to the trust that is reposed in them under their oaths and not administer justice in the manner I have indicated, then we will not have protection under our laws either as citizens or as members of the body public.

You understand, gentlemen of the jury, that your body
10 and this court are merely instrumentalities created by the law for the purpose of working out and administering justice. It is sometimes argued to juries by counsel, "a jury will not send a man to the penitentiary or the gallows," and so on; that is an argument that has no weight whatever. If a man, under the law, goes to the penitentiary or goes to the gallows, it is because of his misdeeds that he goes. Juries merely declare the facts in the particular case being tried and the court declares the law, and if the true facts and the law condemn the defendant it is the law rightly administered that condemns, and we cannot shirk our responsibility or evade it.

Now gentlemen of the jury, a part of the obligation of the court in the trial of cases such as this case now being tried is to define the issues or the issue in the case. That is, to state to the jury so clearly, concisely and accurately just what it is that will be determined by their verdict that no mistake can be made.

The defendant in this case, an inmate of the Federal Prison in this city, was presented to a Grand Jury. The Grand Jury returned an indictment or true bill against him charging him with the offense of murder in the first degree, as that crime is defined by the present Penal Code, in that he did on the 26th day of last March, deliberately, premeditatedly, with malice aforethought, kill and

murder Guard Turner. The Section of the Code under which the indictment is returned, reads, as follows:

Section 273. "Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying — wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree. Any other murder is murder in the second degree."

The indictment in this case returned against the defendant for this killing is an indictment for murder in the first degree,
11 and none other.

To this indictment the defendant pleads not guilty, hence, it devolves upon the government to prove beyond a reasonable doubt to your satisfaction each of the ingredients which go to make up the charge which is preferred against him.

You understand, gentlemen of the jury, in our courts of justice in criminal cases, such as this, the defendant is presumed in the law to be innocent until the government shall prove him guilty of the offense with which he is charged beyond a reasonable doubt. Now I apprehend I had better define to you that term "reasonable doubt." I would say to you, it means exactly what is says, a reasonable doubt. It does not, on the one hand, mean a mere possibility of the innocence of the defendant charged; it does mean such a substantial doubt in the mind as will cause a man of reasonable prudence and caution to pause or hesitate before engaging in the graver and more important affairs of life. Whenever, in a given case, the jury may say, taking into consideration all the facts and circumstances in evidence in the case, they are persuaded the defendant must be guilty as charged, whenever, I say, there is produced in the mind an abiding conviction the defendant must be, under the evidence, guilty as charged, then there is no longer a reasonable doubt in the mind.

I have said to you, you gentlemen are the exclusive judges of the facts in this case, just as the court is the exclusive judge of the law. So that, in this case, if I shall comment on the evidence in any particular, that is a mere opinion of mine, it is not binding on you.

The defendant in this case does not by his counsel or from the witness stand deny that he slew the deceased, Guard Turner, so that will be a matter that will give your minds no trouble whatever. The defendant in addition to his plea of not guilty, which puts the burden on the government of proving the guilt of the defendant in all its essential particulars beyond a reasonable doubt, makes two affirmative defenses or pleas, as I understand, from the evidence here offered. One, the plea that the act is justifiable because done
12 in self-defense; another, that he is excused from the consequence of this act of killing because of lack of mental capacity to be responsible for the act.

Now, in regard to self-defense, gentlemen, a man has the lawful right in defense of his life or to protect his body from great bodily harm which is imminent to proceed even to the length of taking the life of another if in good faith he believes it is necessary to so do to protect his life or to protect his body from great bodily harm. Such a defense is in law what is known as justifiable homicide. One cannot provoke an attack from another with the intent to take his life and then thereafter say they did it in self-defense. If one is attacked, or if they come, not with the deliberate attempt to engage another in combat, into such circumstances as that it becomes necessary to take the life of another to protect their life or body from great bodily harm, they have the right to do it. So, in this case, if you believe the defendant killed the deceased Guard Turner, and at the time he believed and had reasonable cause to believe from all the facts and circumstances that there surrounded him that he was in danger of his own life, or his body was in danger of great bodily harm at the hands of Turner, then he would have the right, if coming into that kind of circumstances, to go to the length of taking the life of Turner to protect his own life or to protect himself from great bodily harm, if he honestly believed that to be true.

Now on the other, that is what is known in the law as excusable homicide. The law, as I have said to you, presumes the defendant in this case to be innocent until the government proves him guilty beyond a reasonable doubt, and that presumption of innocence attends him throughout the trial.

Again, the law presumes every man to be sane until the contrary appears. Now, it will concern your minds to know just what must be established or what you must believe in order to excuse the defendant in this case for the act of the killing which was done in this case. It is not, I will say, true, on the one hand, every mental defect at all that will excuse an act of killing. It is not every condition of the mind which is abnormal that will excuse such an act. The test is, did the defendant know what he was doing
13 at the time he took the life of the deceased Guard Turner, was he conscious of what he was doing; was he conscious that he was endeavoring through the blow with this knife to take the life of the Guard Turner; did he know that in so doing he was doing a wrong? Or, suppose that some one else had committed this act in his presence, would he have known and believed that the act of the other in so taking the life was wrong? Was he conscious of his surroundings? Was he conscious of exactly what he was doing or attempting to do? Did he know in so doing that he was committing a wrong for which he might be punished, and which morally he ought not to do? If he was unconscious of the result of his act, if he was unconscious of the fact that he was doing a wrong, if he was unconscious of what the result would be, then he had not the mental capacity that would hold him responsible for the act and the law will excuse him. But the fact that he justified it in his own mind, because he did it, would not excuse it if he would have condemned it in another as wrong.

Now, as I have said to you, the presumption of law is, the defend-

ant was sane at the time he committed this act and the presumption is on his trial here that he is sane. That, however, is not an absolute presumption. Gentlemen of the jury, in this case it devolves upon the government to prove, and you must believe beyond a reasonable doubt, first, that this defendant did kill the deceased Guard Turner; that he did that deliberately; that is, that he did it after contemplating the act and purposely; that he did it premeditatedly, that is, after thinking the matter over for some space of time, no matter how short, before he committed the act. That he did it willfully, that is, that he did it intentionally, that he did it maliciously, that is, it may not have been, and you will not be required to find that he did it with malice toward Turner, but if he did it from an evil heart, with malice toward the institution, toward the officers of the institution, if he did it of any malice toward Turner himself for anything he had done—because the word "malice" as here used in the law means "hatred," "ill-will," and so on—if you believe beyond a reasonable doubt that he committed the deed, and committed it in this manner; and, if you further find beyond a reasonable doubt that he was not excusable on account of his mental incapacity, then
14 you will find the defendant guilty.

However, if the government has failed to so prove in this case, taking into consideration all the evidence in the case, you will find the defendant not guilty.

Now, gentlemen, I have said to you, you are the exclusive judges of the weight of the evidence, the credibility of the witnesses, the facts proven in the case. If you believe any witness has willfully testified falsely concerning any material matters in the case, you are at liberty to disregard the entire testimony of any such witness. Gentlemen of the jury, if this defendant committed this deed against the deceased, acting in his official capacity there in that institution, if he did it deliberately, premeditatedly, willfully and maliciously, and if he knew the character of the act that he was doing, if he knew that it was wrong to do that, that is if he had mental capacity sufficient to comprehend the difference between the right and the wrong, or that that act was wrong, then he must be punished. On the other hand, if you fail to find that he did it deliberately, premeditatedly, maliciously and willfully, as charged in the indictment, or, that he lacks now, or lacked at the time the act was committed the mental capacity of comprehending the nature of the act or that he was doing a wrong, and was incapable of comprehending the right from the wrong then although you may believe he is guilty of doing an act which done by a sane man would constitute murder in the first degree, yet you will excuse him and return a verdict of not guilty But you should examine, gentlemen, very carefully, into the matter.

The safety of society, the sanctity of life, are matters of grave concern in this world. The protection of those who are wrongfully accused is just as grave; so, the responsibility to determine in this case is with you gentlemen. You, as I have said, are the exclusive judge of the facts.

The Court to counsel: Have you a suggestion?

Mr. Boyle: Yes. I want to call your Honor's attention that in defining the elements of murder in the first degree I do not recall that you explained to the jury what deliberation comprehends.

The Court: That is, that it is studied over and thought over beforehand.

15 Mr. Boyle: Yes. I think further, if your Honor please, that within the charge, and under the circumstances of this case, there should be given a charge of man-slaughter under the facts as they have been developed as being included within the charge in this indictment.

The Court: I do not so understand; there is nothing which can be charged here under the evidence except it must either be conviction of the murder or acquittal.

Mr. Robertson: Under the New Criminal Code, Your Honor, the only possible charge here is murder in the first degree.

The Court: Gentlemen, there will be two forms of verdict; one finding the defendant guilty of the charge in the indictment and the other finding him not guilty.

In this world, gentlemen of the jury, the doing of justice, the administration of the law, is often found to confer upon the citizen by the law appointed to aid in its administration, difficult duties. Such a duty confronts you gentlemen in this case, in view of the law as I have given it to you, the respective duties of the court and the jury; I have defined the law to you as I understand it to be; you gentlemen will determine the facts from the evidence in this case.

Mr. Boyle: Now, if you- Honor please, this situation of the statute as it now stands is somewhat new to me; in order to save this man's right, I want to make this further suggestion into the record; that it is your duty to instruct this jury, that if the jury find and believe that the Guard Turner did apply an epithet toward this man, and did undertake to strike him, and that this act of Stroud's was done under those circumstances, then and under those circumstances he could not be convicted of murder in the first degree.

The Court: Well, I have charged the jury what constitutes murder in the first degree, and I have said he cannot in this case be convicted except of murder in the first degree, or acquittal.

Mr. Boyle: I feel you should instruct as I have suggested.

16 The Court: No, under the facts and under the indictment as prepared, I cannot charge on anything except the first degree murder.

Mr. Boyle: My point is not that you should charge otherwise but that you should explain to the jury that if they find these facts as asserted by the defendant in his defense, that then they couldn't find murder in the first degree, and then there is no deliberation and premeditation.

The Court: Now, I have said to you gentlemen, in order to constitute murder in the first degree there must be deliberation, that is, there must have been a point of time before the act was done at which the party in thinking it over determined to do it and it must not have been the result of sudden provocation on the part of the deceased, in anything said or done, but it must have been done after

thinking it over or else the defendant cannot be convicted in this case.

Mr. Boyle: You have defined premeditation but not deliberation there. A cool state of the mind, wherein there is that cool state of the blood.

The Court: Very well, then, I will put it this way. That it must not have occurred through any heat of passion or sudden impulse, but must have been the result of the mind deliberately thinking the matter over before.

Mr. Boyle: Yes. I thank you.

The Court: I do not think, under the circumstances, that we will receive the verdict from the jury this evening. I think, gentlemen of the jury, after you have arrived at a verdict you may seal it, your Foreman will keep it, and return it into court tomorrow morning at nine thirty. After you have arrived at a verdict you will be allowed to separate, but you must not say to any one what the result of your deliberation has been, nor to any one what the state of your deliberations is.

Mr. Boyle: We have no objection to that.

The Court: So, you will return your verdict and bring it into court tomorrow at nine thirty. You will now retire to your jury room.

(Jury retires at five P. M.)

17 In the above and foregoing charge, the court failed to legally define the term "wilful," "deliberate," "malicious" and "premeditated," as used in section 273, quoted in said charge, which is the section of the federal statute upon which the indictment was based.

5. The court failed to properly state the law as to the insanity of the defendant, to which defendant excepted.

6. The court erred in its said charge, in telling the jury that if they should find as to the defendant certain things to be true, then he must be punished, and the portion of the charge especially referred to is worded as follows:

"Gentlemen of the jury, if this defendant committed this deed against the deceased, acting in his official capacity there in that institution, if he did it deliberately, premeditatedly, wilfully and maliciously, and if he knew the character of the act that he was doing, if he knew that it was wrong to do that—that is, if he had mental capacity sufficient to comprehend the difference between the right and the wrong, or that that act was wrong, then he must be punished,"—to which the defendant excepted.

7. The court further erred in this connection, in further charging the jury in the following words: "On the other hand, if you fail to find that he did it deliberately, premeditatedly, maliciously and wilfully, as charged in the indictment, or that he lacks now, or lacked at the time the act was committed, the mental capacity of comprehending the nature of the act, or that he was doing a wrong,

and was unable to comprehend the right from the wrong, then, although you may believe that he is guilty of doing an act, which done by a sound man would constitute murder in the first degree, yet you will excuse him and return a verdict of not guilty; but you should examine, gentlemen, very carefully into the matter,"—to which the defendant excepted.

8. The court committed error in permitting the attorney for the government, in his opening statement, to attack the character and reputation of the defendant, before the defendant had put his character and reputation in issue—in this, that the court permitted Mr. Robertson, attorney for the government, to use the following words in said opening statement, which is here set out in full: * * *

18

Statement of the Case to the Jury by Mr. Robertson, of Counsel for the Plaintiff.

May it please the court and gentlemen of the jury:

You have already anticipated, I think, gentlemen, substantially what this case is about, and I will explain to you as briefly as I can, and it will be briefly, what the testimony in the case, on the part of the government will be.

This indictment, as I have already stated to you, charges that the defendant on the 26th day of March of this year in the Federal Prison, a place with- the exclusive jurisdiction of the United States, in this District, stabbed and thereby inflicted upon Andrew Turner, a guard in the Federal Penitentiary, a mortal wound, from which he immediately afterwards died. The charge is that this was a premeditated murder. Gentlemen, the testimony, I think, will fairly sustain that charge. It will show that the defendant, Robert F. Stroud, was a prisoner there at the time in the Federal Penitentiary. This occur-ence happened at noon, during the noon meal. Something like twelve hundred men, if I am correct, in the dining room at that time, a great many of whom saw this occur-ence, some of whom know something of what lead up to this occur-ence.

The dining room consists of a number of rows of seats, and between the seats are aisles. I think they seat five in a place together, and then five behind them, and so on, making up a tier of seats, and there are several tiers of those running down through the hall. In this dining hall, or mess hall, as it is called, the institution there has a number of guards during the meal to look after things there and to wait on the prisoners and see if they have enough to eat, and see that order is preserved and the rules of the prison observed.

Under the arrangement there is a man, a Capitain, who oversees—occupies a position in front of these tables where he oversees the entire dining room; overseeing the guards, and oversees the men, and oversees the waiters waiting on the men as they eat. Stroud was back, as I remember it, in one of these tiers of seats, something like possibly fifteen from the front. I may not be able to be accurate about these matters gentlemen of the jury,

19

I am simply giving them to you approximately as I understand them. Stroud at the noon meal was sitting back something like fifteen seats from the front; he was the center man on his row of seats, two to each side of him, two between him and the aisle in either direction. The man who was killed was one of the guards, Andrew Turner, in that institution, and on duty that day, at that meal and in one of the aisles next to where Stroud was sitting. During the course of the meal Stroud signalled to Mr. Turner for permission, as is permitted there by the rules of the institution, apparently to retire to the toilet room. The guard nodded consent and Stroud got up from his seat and instead of going out approached the Guard, began talking to him, said something to him, just what he said the different witnesses do not exactly agree, one heard one thing and one heard another, but in substance, it was something like this: "Did you report me?" One witness will testify that Mr. Turner said "No." Another will testify he heard Mr. Turner say "Go along now, mind your own business" and another one may testify he thought Mr. Turner indicated he had reported him, but at any rate a conversation occurred there between them that was animated, an animated conversation, it only took a moment for this to occur, and after Turner made his reply, whether it be "No" or what it was, after he made his reply, the defendant who is — left-handed man, suddenly brought his hand up and brought it down quickly with a dagger in it, jammed the dagger into this man's left side, went into the breast and into and through the heart, as I understand it, and he died practically instantly, possibly had some little life as he was carried into the hospital but had almost expired before he was picked up. I think it will appear in the testimony that perhaps what Stroud said to Turner was, "Did you shoot me?" A term in the prison there which means, "Did you report me?" The testimony will show gentlemen of the jury that that occur-ence referred to something that had happened on the previous day, which was this. Stroud had done something which the Guard considered a violation of the discipline in the institution, and he leaned over to him, as was the custom, and asked him his number. I think you all understand they go by numbers rather than by names in the institution; and Turner asked him on the night before, at the meal the night before, after he committed that violation, his number, and he gave him his number, which meant to Stroud, and meant to any of the other prisoners who heard what was going on, that Stroud was going to be reported in the office for a violation of the rules. On the way to the cell after the evening meal on Saturday—this stabbing occurred on Sunday noon—this taking of the number occurred on Saturday evening. On the way to the cell house after the evening meal that Saturday evening Stroud was heard in an ill-humored way to be talking to other prisoners in the line of march from the dining room to the cell, saying to them, perhaps using vile language, "Wonder if that fellow will shoot me," or "wonder if he did shoot me," meaning, I wonder if he reported me to the office, and he said, "I will get him for that" or words to that effect.

It will appear in the testimony that Stroud had had this dagger knife for some time, a fact, however, not known to the prison officials, and that when he went out to the meal Sunday noon he took that with him. I think it will appear in testimony, gentlemen, that not only did Stroud take this as a serious offense for which he ought to kill this man, but it will appear that aside from this, we know not why, he had a feeling against him, the testimony may explain the reason for that additional circumstance, and for that additional feeling. But be that as it may, I think the testimony will clearly disclose that condition also. Stroud had been in the institution for a number of years up here and was there serving a term for a crime similar to this committed in Alaska, for shooting a man up there. Also, I think it will appear in testimony that after being sentenced for man-slaughter on the charge up in Alaska, he was transferred to the Federal Penitentiary at McNeal's Island which is out in the Pacific Ocean from Tacoma, and while there he got into an altercation with a fellow convict and tried to kill him.

21 Mr. Boyle: I desire to object to this, if Your Honor please, as not a proper statement.

The Court: I am inclined to think I will sustain the objection.

Mr. Robertson: Does your Honor think we cannot show similar offenses preceding this one?

The Court: I suppose the act here carries the intent. I am inclined to think so; I do not think I would go into that.

Mr. Boyle: If Your Honor please, I desire also to move to strike this from the record, and the court to instruct the jury in reference to it, the statement of counsel wherein he says that he was convicted for an act similar to this for which he is now being charged, as not being a proper statement.

The Court: Very well; I think so far as his being in the institution, the fact that he has been there for some time, and those matters, are proper, the other I think we will exclude.

Mr. Robertson: Very well.

The testimony will show you gentlemen of the jury that this man has a general feeling of opposition to the restraint he has been under; that that carries him to a position where he hates the prison officers, where he hates the assi-tants of the prison authorities, the trusty prisoners, the guards, the employes of the institution. And after you have heard all the fact-, without going into all of these various details, you will discover, I think, unquestionably that this man's act here was born of a deliberate malice; that he——

Mr. Boyle: I object, if Your Honor please, as not a statement of fact, and as in the form of argument, and I desire again to object — in to this record the statement of counsel to the effect he will show this man had a hatred towards the general officers of the penitentiary, as not being a proper matter of inquiry in this case.

The Court: I am inclined to think it is, as a motive.

22 Mr. Boyle: I desire to save an exception.

The Court: Proceed.

Mr. Robertson: You will realize, gentlemen of the jury, that it is quite impossible for the prosecuting attorney to go into all of the details and explain in advance how everything will work out here. You gentlemen with your faculties of observation will be able to gather that from the witnesses without a long, detailed explanation from me. But I would want to call your attention to this, gentlemen; that since this occurrence the defendant has written some letters that the government has possession of. In addition to those it also has a letter which he wrote on Saturday, perhaps on Saturday evening of the day that his number was taken by the Guard, which letter was finished on Sunday morning, it says: Sunday morning, which would be a few hours before the man was killed. These letters will show to you gentlemen of the jury, considerable, I think, of the attitude of this man in these things that I have been telling you about, and particularly his attitude toward the prison and its officers. These letters will also show you that he had a feeling against this Guard, a distinct feeling, personal to and against this Guard Turner whom he killed. These letters will in my judgment be the testimony in a large measure that will show to you the true character of this man, and that is, that he is a depraved criminal.

Mr. Boyle: I object to that, if Your Honor please, as not a proper statement in any way in this case.

The Court: I think I will strike that out.

Mr. Robertson: It seems to me that is proper, Your Honor, under the condition of the facts here.

The Court: It may tend to show he is guilty of the offense of which he is here charged.

23 Mr. Robertson: These letters will show to you, gentlemen of the jury, a disposition on the part of this man—that he is satisfied with what he has done, that he is justified in what he has done, that he is pleased with what he did, and in these letters he speaks in a facetious and boasting way both of what he has done in the killing of this man Turner. The letters, while they disclose that the boy has had some learning, they also disclose a sad lack of it at the same time. These letters will further show to you that he apparently wants to be known to others, and particularly to those by whom he is surrounded, to his people, whom he often refers to, and by his people I think is meant in these letters, without a doubt, the associates, the other prisoners in the penitentiary, he wants to be known to them as a distinctly bad man, a man to be afraid of. These letters also show, gentlemen of the jury, some of these letters are written to the young man's mother, one of them written to his father. The others are written, two, to a young brother who- he has in Kansas City. You will understand that his residence before being in the prison was at Juneau, Alaska, and there is where the mother lives. A short time ago his brother, a young man, whom I understand is about eighteen, came down from Alaska, and is doing something in Kansas City, Missouri, I rather think going to school. Now, these letters, running through them, will also show an ac-

quaintance with people of a criminal character, maintaining terms with people of that class.

Mr. Boyle: Your Honor, I object to this line of statement; it could have no other weight than to prejudice the jury.

The Court: It may have to do with a presumption that yet rests in the case.

Mr. Boyle: Except.

Mr. Robertson: That is not all of my statement; perhaps you would not object if you heard it all. A part of these people whom he refers to, either being in the penitentiary or having come there since he has been there, at least part of them.

Mr. Boyle: Now, if Your Honor please, I reinforce the objection that I made, as having a tendency to prejudice this jury as to the man's associates; that is no evidence of the act that we are here inquiring of nor of any element of the crime charged.

The Court: I am not sure, I will allow it to stand at this time; I will strike it out later, if I find it should be.

Mr. Robertson: Gentlemen, the offense occurred on the 26th day of March of this year. I think on the night of the 29th of March he was overheard in a conversation, this defendant, with one of the prisoners in that institution, in the isolation ward. You will understand that they have in the prison what is known as the isolation ward, which is a small cell house off by itself where prisoners are kept if it is desired to take them out of the general body of the institution. They take them over to this isolation ward which is the Deputy Warden's office. In there there was a prisoner by the name of J. S. Jones, whose cell was near this man Stroud's. I think fifteen or eighteen feet apart, something like that, and Guard Brown and a prisoner there by the name of Tyson, a colored man, overheard conversation between Jones and the defendant Stroud that night, in which they discussed quite in detail this affair, and in which conversation Stroud explained just how he did, and why he did this thing, and stating that he did it to fix this guard for what he had done, and explaining to Jones, and talking it over with him, and Jones talking back to him, in which Stroud said further, that he had a good knife, or something to that effect, and that he got him just right when he did get him, and he knew when he jammed the dagger into him he had him right. I don't care to repeat any of the vile language this man has used from time to time, but it may possibly come out here it was used freely, and it was used freely upon this occasion, the night of the 29th of March, when he was talking with J. S. Jones about this matter. So that, gentlemen of the jury, will show, I think, fairly, that the charge made in the indictment is a correct one.

Now so far as the case of the government is concerned that is substantially an outliine of what will be presented to you. A good share of these witnesses are guards in the institution and nearly an equal number, perhaps an equal number, are of necessity, prisoners in the institution. I think that it is unnecessary for me to go into any further detail at this time. It may pos-

sibly be I will want to make a short reply to what General Boyle or his co-counsel may have to say.

To which the defendant excepted.

9. The court erred in saying to Dr. Milne, a witness offered by the defendant, and who testified that in his opinion the defendant was insane, and long had been, in asking Dr. Milne the following questions: "Do you think the defendant knows where he is; do you not think the defendant knows what is going on here?" for the reason that the court's inquiries were so connected with the witness' testimony that it tended to lead the jury to the belief that in the opinion of the court such knowledge would rebut the evidence of defendant's insanity offered in the case, to which the defendant excepted.

10. The court erred in failing to instruct the jury that there was no legal evidence showing beyond a reasonable doubt that the killing of Guard Turner as charged in the indictment was at or within a place under the exclusive jurisdiction of the United States, to which the defendant excepted.

11. The court failed in its charge heretofore set forth in full, to say to the jury that the jury had to find beyond a reasonable doubt that the offense charged in the indictment was committed at and within a place under the exclusive jurisdiction of the United States, and that unless they so found they should find the defendant not guilty,—to which the defendant excepted.

12. The court erred in permitting the plaintiff to prove against the defendant, or to introduce evidence tending to show that he had been convicted of offenses prior to the one charged in the indictment,—to which the defendant excepted.

13. The court erred in permitting the plaintiff to prove in this case the details of alleged prior offenses committed by the
26 defendant, over the objection of the defendant,—to which the defendant excepted.

14. The court erred in permitting the United States to attack by the testimony of officials of the State of Washington, the general reputation of the defendant, when the defendant had not made his reputation an issue in the case,—to which the defendant excepted.

15. The court erred in failing to charge the jury to find the defendant not guilty.

16. The court erred in failing to charge the jury as to the law of second degree murder,—to which the defendant excepted.

16. The court committed error, in this—it appears in the charge of the court that the following colloquy took place between the court and the attorney for the defendant:

Mr. Boyle: "I think, if your Honor please, that within the charge, and under the circumstances of this case, there should be given a charge of manslaughter, under the facts as they have been developed, as being included within the charge in this indictment."

The Court: "I do not so understand; there is nothing which can be charged here under the evidence, except it must either be conviction of the murder or acquittal."

Mr. Robertson: Under the new criminal code, your Honor, the only possible charge here is murder in the first degree."

The Court: "Gentlemen, there will be two forms of verdict; one finding the defendant guilty of the charge in the indictment, and the other finding him not guilty. In this world, gentlemen of the jury, the doing of justice, the administration of the law, is often found to confer upon the citizen by the law appointed to aid in its administration, difficult duties. Such a duty confronts you, gentlemen, in this case; and, in view of the law as I have given it to you, the respective duties of the court and the jury, I have defined the law to you as I understand it to be. You gentlemen will determine the facts from the evidence in this case,"—to which refusal of the court to instruct upon the law of manslaughter the defendant excepted.

27 17. The charge to the jury by the court failed to advise them of the meaning of "wilfull," "deliberate," "premeditated" killing, "with malice aforethought," and failed to advise them of the burden upon the government in proving the sanity of the defendant, and failed to advise them of the law of second degree murder and manslaughter, and failed to advise them to find the defendant not guilty, under the evidence.

18. The trial court erred in refusing to direct a verdict of not guilty at the close of all the evidence.

19. The trial court erred in denying the motion for a new trial on behalf of the defendant.

20. The trial court erred in denying the motion in arrest of judgment on behalf of the defendant.

21. It was error *from* Mr. Robertson for the plaintiff to say as he did in the hearing of the jury, "the defense is a frame up."

Wherefore, said defendant prays that the judgment aforesaid may be reversed, annul-ed, and altogether held for nothing, and that he may be restored to all things he has lost by said judgment.

L. C. BOYLE,
I. B. KIMBRELL,
Attorneys for Defendant.

Filed in the District Court May 27, 1916.

UNITED STATES OF AMERICA, *ss:*

[SEAL.]

The President of the United States of America to the Honorable the Judges of the District Court of the United States for the District of Kansas, Greeting:

Whereas, lately in the District Court of the United States for the District of Kansas, before you, or some of you in a cause
28 between the United States of America, plaintiff and Robert F. Stroud, defendant, wherein the judgment and sentence of the said District Court, in this cause, entered, on the 27th day of May, A. D. 1916, is in the following words, viz:—

"Now on this 27th day of May, 1916, the defendant, Robert F. Stroud, being present in person and by L. C. Boyle and I. B. Kimbrell his attorneys, the United States being represented by Fred Robertson, United States Attorney. Said Fred Robertson, United States Attorney, moves the court for judgment and sentence upon the verdict of the jury heretofore returned and filed in this cause. Thereupon the court asked the defendant, Robert F. Stroud, if he had anything to say why the judgment of the court and sentence of the law should not be pronounced against him at this time, to which interrogatory, propounded by the court, the defendant, Robert F. Stroud made no reply. Thereupon it is now here by the court considered, ordered and adjudged, that the said Robert F. Stroud be remanded to the custody of the Warden of the United States Penitentiary for the District of Kansas, until Friday, the 21st day of July, 1916, and that on that day between the hours of 9 o'clock A. M. and 12 noon of said day, he, the said Robert F. Stroud, be, by the United States Marshal for the District of Kansas, taken from the prison, to some suitable place within the United States Military Reservation, in Leavenworth County, Kansas, and that he, the said Robert F. Stroud, then and there be hanged by the neck until he is dead.

"Thereupon said defendant, Robert F. Stroud, through his attorneys, presented to the Court, without argument, his motion for a new trial and motion in arrest of judgment, which motions are by the Court read, duly considered and overruled, to which order and ruling of the court defendant excepts.

"Thereupon said defendant, through his attorneys, moves the Court for time within which to prepare and present herein his Bill of Exceptions, and it is thereupon ordered that said defendant be, and he is hereby, granted thirty days from this date within which to prepare and present his Bill of Exceptions herein."

29 as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Circuit Court of Appeals, Eighth Circuit, by virtue of a writ of error, agreeably to the act of Congress, in such case made and provided, fully and at large appears;

And whereas, at the December term, in the year of our Lord one thousand nine hundred and sixteen, the said cause came on to be heard before the said United States Circuit Court of Appeals, upon the supplemental motion of the plaintiff in error for an order permitting him to prosecute his writ of error in this Court as a poor person and to have the transcript of the record herein printed at the expense of the United States, or for a peremptory reversal of the judgment and sentence imposed upon him for error apparent upon the face of the record.

The plaintiff in error appears in support of said motion by his counsel Mr. Martin J. O'Donnell and the defendant in error appears by Mr. Fred Robertson, United States Attorney for the District of Kansas, and this Court having heard the statement of the United States Attorney, considers the error committed at the trial of this cause, sufficient to warrant a reversal of the judgment and sentence of the Court below and the granting of a new trial to the plaintiff in error, Robert F. Stroud.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, reversed without costs to either party in this Court.

It is further ordered and adjudged by this Court that this cause be, and the same is hereby, remanded to the said District Court with directions to grant a new trial.

It is further ordered, in pursuance of the motion of defendant in error, that mandate in this cause shall be forthwith issued to the said District Court.

December 19, 1916.

30 You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said writ of error notwithstanding.

Witness, The Honorable Edward D. White, Chief Justice of the United States, the twenty-first day of December, in the year of our Lord one thousand nine hundred and sixteen.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

Filed in the District Court December 22, 1916.

Verdict of May 28, 1917.

No. 4287.

THE UNITED STATES OF AMERICA

vs.

ROBERT F. STROUD.

We, the jury in the above entitled case, duly impaneled and sworn, upon our oaths do find the defendant, Robert F. Stroud, guilty as charged in the indictment without capital punishment.

HAROLD C. SHORT,
Foreman.

Filed in the District Court May 28, 1917.

31 Be it remembered, that at a Special Term of the District Court of the United States of America for the District of Kansas, begun and held at the City of Leavenworth in said District, on Monday, the 28th day of May, 1917, the following proceedings, among others, were had, and appear of record in words and figures as follows:

Journal Entry of Judgment and Sentence.

Now come the parties hereto same as before, said defendant being present in his own proper person, and the jury being called and all being present, the trial of said case is proceeded with. Thereupon defendant again urges his petition for a writ of habeas corpus ad testificandum and said petition is by the court again denied, to which order of the court in again denying said petition defendant excepts. And thereupon the jury having heard the evidence, arguments of counsel and the instructions of the Court, retires in charge of its sworn bailiff to consider its verdict. And afterward said jury returns into open court and through its Foreman presents the following verdict, to-wit:

"In the District Court of the United States for the District of Kansas,
First Division.

No. 4287.

THE UNITED STATES OF AMERICA

vs.

ROBERT F. STROUD.

We, the jury in the above entitled case, duly impaneled and sworn, upon our oaths do find the defendant, Robert F. Stroud, guilty as charged in the indictment, without capital punishment.

HAROLD C. SHORT,
Foreman."

Thereupon the United States attorney moves the court for judgment and sentence on the verdict returned herein and thereupon the court inquired of the defendant if he had any good reason to offer why the judgment and sentence of the court should not now be pronounced against him and said defendant replied that he had none. Thereupon it is now here by the court considered, ordered and adjudged, that said defendant, Robert F. Stroud, be imprisoned in the United States Penitentiary at Leavenworth, Kansas, for the period of his natural life.

It is further ordered that said defendant be remanded to
32 the custody of the Warden of said Penitentiary to be by him imprisoned and safely kept in accordance with the judgment and sentence herein.

Entered in Journal "U" at page 491.

Assignment of Errors (Second Trial).

Now comes into court here said defendant, Robert F. Stroud, in his own proper person, and by his attorneys, and says that in the record and proceedings aforesaid there is manifest error, in this:

1. The court erred in that it denied the petition for a writ of habeas corpus ad testificandum filed by defendant by which petition it appeared that nine witnesses who were in the custody of Hon. Thomas Morgan, Warden of the United States Penitentiary at Fort Leavenworth, Kansas, were competent, material and necessary witnesses in the trial of this cause on behalf of the defendant, and that if they were present at said trial they would give material testimony bearing upon the issues in said cause on the part of the defendant, and this notwithstanding the court had theretofore sustained a similar petition sworn to and filed by the United States District Attorney on the part of the Government to produce certain convicted felons then in said penitentiary serving sentences imposed by courts of

competent jurisdiction and permitted the jury to consider the testimony of such convicted felons, thus and thereby denying to defendant a right which it accorded to the government and denying to the defendant a fair and impartial trial and denying him the equal protection of the laws contrary to common right and justice, and thereby attempting to deprive him of his life and actually depriving him of his liberty without due process of law, in violation of the 5th Amendment to the Constitution of the United States and thus and thereby denying him the right to have compulsory
33 process for obtaining witnesses in his favor, in violation of the 6th Amendment to the Constitution of these United States.

2. The court erred in that it applied to the trial of this cause a rule of law which was never recognized or adopted by or in the Constitution and laws of the United States in that it held that inmates of a penitentiary who were witnesses to the killing charged against the defendant herein who was also an inmate, were incompetent to testify in said cause on the trial of a convict for murder in the first degree, that the court in so holding assumed to exercise power on the part of the United States which was not delegated to the United States by the constitution of the United States, and this in violation of the provisions of the Tenth Amendment to the Constitution of the United States.

3. The Court erred in that it denied the defendant's petition for a rule upon the United States District Attorney, Marshal and Clerk to return to defendant letters unlawfully and unreasonably seized and searched after same had been deposited with officers of the government of the United States for transmission through the mails, thus and thereby depriving defendant of his rights to be secure from unreasonable searches and seizures under the provisions of the Fourth Amendment to the Constitution of the United States.

4. The Court erred in that it admitted the letters mentioned in the Third Assignment of Error herein after it had taken jurisdiction of the issue made upon defendant's petition for a rule upon the District Attorney to return same to defendant, and heard evidence showing that said letters had been unlawfully seized and searched, before the trial of this cause, and this in violation of defendant's rights under the Fifth Amendment to the Constitution of the United States.

Wherefore, the said Robert F. Stroud prays that the judg-
34 ment aforesaid may be reversed, annulled and altogether held for nothing, and that he may be restored to all things he has lost by said judgment and sentence.

I. B. KIMBRELL,
MARTIN J. O'DONNELL,
Attorneys for Plaintiff in Error.

Filed in the District Court August 25, 1917.

35 UNITED STATES OF AMERICA, *ss:*

[SEAL.]

The President of the United States of America to the Honorable the Judge of the District Court of the United States for the District of Kansas, Greeting:

Whereas, lately in the District Court of the United States for the District of Kansas, before you, in a cause between The United States of America, plaintiff, and Robert F. Stroud, defendant, No. 4287, wherein the judgment of the said District Court, entered in said cause on the 28th day of May, A. D. 1917, is in the following words, viz:

"Thereupon the United States Attorney moves the court for judgment and sentence on the verdict returned herein and thereupon the court inquired of the defendant if he had any good reason to offer why the judgment and sentence of the court should not now be pronounced against him and said defendant replied that he had none.

Thereupon it is now here by the Court considered, ordered and adjudged that said defendant, Robert F. Stroud, be imprisoned in the United States Penitentiary at Leavenworth, Kansas, for the period of his natural life.

It is further ordered that said defendant be remanded to the custody of the Warden of said penitentiary, to be by him imprisoned and safely kept in accordance with the judgment and sentence herein," as by the inspection of the transcript of the record of the said District Court, which was brought into the Supreme Court of the United States by virtue of a writ of error agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and seventeen, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and Mr. Solicitor General Davis, of counsel for the defendant in error, having filed a confession of error and moved the Court to reverse the judgment herein.

36 It is therefore, in pursuance of said confession and motion, now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed.

And it is further ordered, that this cause be, and the same is hereby, remanded to the said District Court for further proceedings.

February 4, 1918.

You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the judgment of this Court, as according to right and justice, and the laws of the United States ought to be had, the said writ of error notwithstanding.

Witness, the Honorable Edward D. White, Chief Justice of the

United States, the fifteenth day of February, in the year of our Lord one thousand nine hundred and eighteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Filed in the District Court February 18, 1918.

37 *Journal Entry of Trial, June* 24, 1918.

Now on this day come the parties hereto, the plaintiff appearing by Fred Robertson, United States Attorney, and L. S. Harvey, Assistant United States Attorney; the defendant, Robert F. Stroud, being present in his own proper person and by I. B. Kimbrell, Martin J. O'Donnell, Benjamin F. Endres, and John T. O'Keefe, his attorneys.

Thereupon defendant, through his counsel, presents to the Court his motion to render judgment in this cause in accordance with the judgment and mandate of the Supreme Court of the United States, received and filed in this cause on February 18th, 1918; and thereupon the court being advised that an order has heretofore been entered in this cause in accordance with such mandate, said motion is at this time overruled; to which ruling of the court defendant excepts.

Thereupon defendant, through his counsel, presents to the court his petition to transfer this case for trial to another Division of this District, and the court having heard the statement of counsel and being well advised in the premises finds that said petition should be and the same is hereby overruled, except as to defendant's objections to jurors summoned to serve at this term of court from the county of Leavenworth in said District; and the clerk is directed to eliminate from the list of jurors to be called in this case all persons residing in Leavenworth County, in said District; to which order and ruling of the court on said petition other than the elimination of said jurors, residents of Leavenworth County, defendant then and there excepted.

Thereupon comes on for hearing defendant's motion to quash the jury panels, and the Court having heard the statement of counsel, examined the said motion and being well advised in the premises,

38 finds that said motion should be and the same is hereby overruled, except as sustained in the last preceding paragraph; to which order and ruling of the Court defendant excepts, in so far as said motion is overruled.

Thereupon the defendant presents to the Court his plea in bar, and the Court having heard the statements of counsel and being well advised in the premises finds that said plea should be and the same is hereby overruled; to which order and ruling of the court the defendant excepts.

Thereupon defendant presents his petition for a ruling upon the United States Attorney, Marshal and Clerk for the return of certain letters and papers; and the Court having heard the statements of counsel and being well advised in the premises finds that said peti-

tion should be and the same is hereby overruled; to which order and ruling of the Court defendant excepts.

Thereupon defendant presents to the Court his application and affidavit for the production of the following witnesses at the trial of this case in his behalf, at the expense of the Government; Francis E. Searway, Ada, Pennsylvania; James M. Darnell, Peoria, Illinois, and Robert C. Stone, Perryville, Maryland; and the court having considered said application, finds the same should be and the same is hereby granted as to witness James N. Darnell, the defendant waiving said application as to witnesses Francis E. Searway and Robert C. Stone.

Thereupon the parties hereto announcing themselves ready for trial, the empaneling of a jury to try the issues herein is begun, and the hour of adjournment having arrived, and the trial of said case not being concluded all jurors in the box are admonished of their duties by the Court, and the further hearing of said case is postponed until 9:30 tomorrow morning.

Entered in Journal "V" on page 349.

39 *Journal Entry of Trial, June* 25, 1918.

Now come the parties hereto same as on yesterday, the defendant being present in his own proper person; and thereupon the empaneling of a jury is proceeded with, and to try the issues submitted to it comes the following jury, to-wit:—Frank Johnson, W. F. Dixon, John Doyle, E. L. Carson, D. F. Whittaker, Wm. E. Osterhold, Fred Layton, J. W. Bert, Ham Kent, Sr., W. D. Ayers, W. H. Wooley and H. C. Coons, twelve good and lawful men of the body of the First Division of the District of Kansas, who being duly empaneled and sworn to well and truly try the issues submitted to them, and a true verdict give according to the law and the evidence, the trial of said case is proceeded with.

And the hour of adjournment having arrived and the trial of said case not being concluded, the jury is admonished of its duties by the Court, and the further hearing of said case is postponed until 9:30 tomorrow morning.

Thereupon on application therefor, it is ordered by the Court that the jurors be not allowed to separate during the trial of this case, and the United States Marshal is hereby ordered to furnish lodging and subsistence to the jury during the trial.

Entered in Journal "V" on page 352.

Journal Entry of Trial, June 26, 1918.

Now come the parties hereto same as on yesterday, the defendant, Robert F. Stroud, being present in his own proper person, and the jury being called and all being present the trial of said case is proceeded with; and the hour of adjournment having arrived and the trial of said case not being concluded, the jury is admonished of its duties

by the Court, and the further hearing of said case is postponed until tomorrow.

Entered in Journal "V" on page 353.

Journal Entry of Trial, June 27, 1918.

Now come the parties hereto same as on yesterday, the defendant, Robert F. Stroud, being present in his own proper person and the jurors being called and all being present, the trial of said cause is proceeded with; and the hour of adjournment having arrived and the trial of said case not being concluded, the jury admonished of its duties, by the court, and the further hearing of said case is postponed until 9:30 tomorrow morning.

Entered in Journal "V" on page 354.

Journal Entry of Trial, June 28, 1918.

Now come the parties hereto same as on yesterday, the defendant, Robert F. Stroud, being present in his own proper person, and the jury being called and all being present the trial of said case is proceeded with; and the jury having heard the evidence, arguments of counsel, and the instructions of the court retires in charge of its sworn bailiff to consider its verdict; and afterwards said jury returns into open court, all parties hereto being present same as before, the defendant, Robert F. Stroud being present in his own proper person, and through its foreman, presents the following verdict, to-wit:—

"In the District Court of the United States for the District of Kansas,
First Division.

No. 4287.

UNITED STATES OF AMERICA

v.

ROBERT F. STROUD.

We, the jury in the above entitled case, duly empaneled and sworn upon our oaths find the defendant, Robert F. Stroud, guilty of murder in the first degree as charged in the indictment.

FRANK M. JOHNSON,
Foreman."

Thereupon the United States Attorney moves the court for judgment and sentence upon the verdict of the jury returned herein; and thereupon the court inquired of said defendant,
41 Robert F. Stroud if he had anything to say why the judgment of the court and sentence of the law should not be pro-

nounced against him at this time to which interrogatory of the court the defendant, Robert F. Stroud, made no reply.

Thereupon it is now by the Court considered, ordered and adjudged that the said Robert F. Stroud be remanded to the custody of the Warden of the United States Penitentiary at Leavenworth, Kansas, and by said Warden kept in solitary confinement in said penitentiary until Friday the 8th day of November, 1918, and that on that date between the hours of 6 A. M. and 9 A. M. the said Robert F. Stroud be by the United States Marshal for the District of Kansas, taken to some suitable place within the walls of said United States Penitentiary and be then and there hanged by the neck until he is dead.

Thereupon said defendant, Robert F. Stroud, through his attorneys, moves the court for time within which to prepare and present herein his Bill of Exceptions, and it is thereupon by the Court ordered that said defendant be and he is hereby granted ninety days from this date within which to prepare and present his Bill of Exceptions, herein.

Entered on Journal "V" on page 355.

Verdict.

No. 4287.

UNITED STATES OF AMERICA

vs.

ROBERT F. STROUD.

We, the jury in the above entitled case, duly empaneled and sworn upon our oaths find the defendant, Robert F. Stroud, guilty of murder in the first degree as charged in the indictment.

FRANK M. JOHNSON,
Foreman."

Filed in the District Court on June 28, 1918.

42 *Order Extending Time in which to File Bill of Exceptions.*

Now, for good cause shown, the time heretofore granted to the defendant, Robert F. Stroud, in which to file a Bill of Exceptions is hereby extended to the 1st day of November, 1918.

ROB'T E. LEWIS,
Judge of the District Court of the United States, Assigned for the District of Kansas.

Filed in the District Court on September 24, 1918.

Order Extending Time in which to File Bill of Exceptions.

Now for good cause shown the time heretofore granted to the defendant, Robert F. Stroud, in which to file a Bill of Exceptions is hereby extended to the 24th day of November, 1918.

JOHN C. POLLOCK,
Judge of United States District Court
for the District of Kansas.

Filed in the District Court on October 15, 1918.

Order Extending Time in which to File Bill of Exceptions.

Now for good cause shown the time heretofore granted to the defendant, Robert F. Stroud, in which to file a Bill of Exceptions, is hereby extended to the 24th day of December, 1918.

JOHN C. POLLOCK,
Judge of the District Court of the United
States for the District of Kansas.

Filed in the District Court on Nov. 20, 1918.

43 In the District Court of the United States for the District of Kansas, First Division.

No. 4287.

UNITED STATES OF AMERICA, Plaintiff,

vs.

ROBERT F. STROUD, Defendant.

Defendant's Bill of Exceptions.

Comes now the defendant, Robert F. Stroud, and presents to the Court his Bill of Exceptions to the acts and rulings of the Court on the trial of this cause, held at the Special Term of this Court, commencing on the 20th day of May, 1918, at the City of Leavenworth, Kansas, in said District and Division, as follows, towit:

This cause came on for trial at the Special Term of this Court, appointed to be held and duly convened at the Court House for the United States District Court in the City of Leavenworth on the 20th day of May, 1918, before the Honorable Robert E. Lewis, District Judge.

The United States of America, plaintiff, appeared by Fred Robertson, Esq., United States District Attorney, and L. S. Harvey, Esq., United States Assistant District Attorney.

The defendant, Robert F. Stroud, appeared in person, in the custody of the Warden of the United States Penitentiary at Leavenworth, Kansas.

Mr. Robertson, for the government, stated that the government was ready for trial; defendant's counsel not being present, and it appearing to the court that defendant's counsel were engaged
44 in the trial of a case in the Circuit Court of Jackson County, Missouri, at Kansas City, the Court then and there appointed John J. O'Keefe, Esq., Ben F. Endres, Esq., and W. W. Hooper, Esq., to represent defendant and conduct his defense and continued the cause to the 23rd day of May, 1918, at 9:30 a. m., for trial, to which court then adjourned.

Pursuant to the last stated adjournment, this Court again convened for the trial of this cause on the 23rd day of May, 1918, at Leavenworth, Kansas, the Honorable Robert E. Lewis, District Judge, presiding.

And thereupon the proceedings were had which are set forth at pages 26 to 44 both inclusive, (to which reference is here made to avoid unnecessary repetition):

Pursuant to adjournment, this cause coming on for trial at said adjourned Special Term of this Court, at the City of Leavenworth, Kansas, on the 24th day of June, 1918, before the Honorable Robert E. Lewis, District Judge, the following proceedings were had and taken, evidence taken and offered, acts and rulings done and made and exceptions allowed:

The United States of America, plaintiff, appeared by Fred Robertson, Esq., United States District Attorney, and L. S. Harvey, Esq., United States Assistant District Attorney.

The defendant, Robert F. Stroud, appeared in person, in the custody of the Warden of the United States Penitentiary at Leavenworth, Kansas, and by his attorneys, Mr. Isaac B. Kimbrell,
45 Mr. Martin J. O'Donnell, Mr. John O'Keefe, and Mr. Benjamin Andres.

By the Court: Are you ready in this case, Mr. Robertson?

Mr. Robertson: Ready, your Honor; but I would like to have the Court Stenographer here, Miss La Bar. Something has happened that she is not here, that she didn't expect, because she told me she would certainly be here.

The Court: Is the defendant ready in this case?

Mr. O'Donnell: Before announcing "Ready" we have some motions we would like to file. The first motion is a motion praying the Court to render judgment in accordance with the judgment and mandate of the Supreme Court of the United States.

(The Court thereupon took the motion, and the mandate of the Supreme Court herein.)

Mr. O'Donnell: We would like to have the Court's permission to file this and have the defendant swear to it. Judge Pollock entered an order on the mandate, but we didn't have notice of that, if your

Honor please, and we do not think that it is in conformity with the judgment.

And thereupon the Court granted leave to file, and the defendant did file the following motion, to-wit:

46 (Omitting Title of Cause.)

Motion Praying the Court to Render Judgment in This Cause in Accordance with the Judgment and Mandate of the Supreme Court of the United States.

Now comes Robert F. Stroud, defendant herein, and states that he prosecuted a writ of error from a judgment of conviction rendered in this court on the 28th day of May, 1917, to the Supreme Court of the United States, by filing his petition for writ of error which was duly allowed on the 25th day of August, 1917; that said petition recites "that in the judgment and proceedings prior thereunto in this cause certain errors were committed to the prejudice of defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition;" that said assignment of errors was filed in this court on the 25th day of August, 1917, is part *to* the record in this case and is made a part of this motion.

That thereafter a bill of exceptions was filed in this court on the said 25th day of August, 1917, which constitutes a part of the record in this cause, and is made a part hereof; that thereafter a transcript of the proceedings in this cause had during the special May, 1917, term of this court in accordance with the præcipe duly filed with the clerk of this court, was on the 6th day of September, 1917, under the seal of this court, certified to the Supreme Court of the United States and said transcript was duly filed in said Supreme Court on the 21st day of September, 1917; that thereafter and during the October, 1917, term of the Supreme Court of the United States and on the 4th day of February, 1918, the plaintiff herein, to-wit, the United States, appeared in said Supreme Court by the Honorable John W. Davis, Solicitor General of the United States, and
47 confessed the errors alleged against said judgment and said cause was thereupon remanded to this court for further proceedings; that said Solicitor General filed a written confession of errors in said Supreme Court of the United States, a copy of which is marked Exhibit "A" hereto attached, and made a part hereof; that a mandate of the Supreme Court of the United States was duly transmitted to the clerk of this court, filed in this court *is* a part of its records and is made part of this motion.

That the judgment of reversal of the said Supreme Court was based upon the transcript of the proceedings of this cause duly filed in said Supreme Court and the said confession of errors, as will more fully appear from said mandate; that the legal effect of the said judgment of reversal based upon said confession and transcript was to sustain the contention of the defendant herein and to adjudicate all the errors specified in the Assignment of errors against the United

States and in favor of defendant herein; that by reason of said judgment of reversal it is the duty of this court to sustain the petition of defendant herein for a rule upon the United States District Attorney to return the letters and papers mentioned in his said petition filed in this court and cause on the 24th day of May, 1917, and to sustain this defendant's petition for a writ of habeas corpus ad testificandum filed in this court and cause on the 26th day of May, A. D. 1917.

Wherefore, Robert F. Stroud, the defendant herein prays the court to order said District Attorney to return to said defendant the letters mentioned in said petition filed on May 24, 1917, and to order the writ of habeas corpus ad testificandum prayed for in said defendant's petition filed in this court on May 26, 1917, to issue.

I. B. KIMBRELL,
MARTIN J. O'DONNELL,
Attorneys for Defendant.

48 STATE OF KANSAS,
County of Leavenworth, ss:

Robert F. Stroud, of lawful age, being duly sworn upon his oath states that he has read the above and foregoing affidavit and application, and that the matters and things set forth therein are true according to his best knowledge and belief.

(Signed) R. F. STROUD.

Subscribed and sworn to before me this 24th day of June, 1918.

[Seal of District Court of the United States, District of Kansas.]

(Signed) F. L. CAMPBELL,
Clerk.

(EXHIBIT A.)

In the Supreme Court of the United States, October Term, 1917.

ROBERT F. STROUD, Plaintiff in Error,

v.

THE UNITED STATES, Defendant in Error.

Confession of Error.

Comes now the United States, defendant in error in the above entitled cause, by John W. Davis, Solicitor General, and confessing error therein moves the court to reverse the judgment therein and to remand the case to the United States District Court for the Dis-

trict of Kansas for new trial; and further that the mandate of this court issue forthwith.

(Signed) JOHN W. DAVIS,
Solicitor General.

49 (4-2-3-59.)

Endorsed: File No. 26,161. Supreme Court U. S., October Term, 1917. Term No. 694. Robert F. Stroud, pl'ff in error, v. The United States. Confession of Error, Motion to Reverse and that Mandate Issue Forthwith. Filed Feb. 4, 1918.

A true copy. Test:

[Seal of the Supreme Court of the United States.]

(Signed) JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

50 The Court: The motion will be overruled.

And to this ruling and action of the Court defendant then and there duly excepted and still excepts.

The Court: Any other motions?

Mr. O'Donnell: We are filing, if your Honor please, a motion to transfer the case from the First Division, to transfer the case for trial from this Division to another Division.

The Court: How large is this Division?

Mr. O'Donnell: I don't know its bounds.

The Court: I think it extends to the western boundary of the state.

The Clerk: The north half of the State.

The Court: Do you know how many Counties?

The Clerk: I don't know exactly, but about 55 counties.

The Court: The Marshal says that this Division is approximately 100 by 400 miles in extent.

And thereupon the Court gave permission to the defendant to file, and the defendant did file his motion to transfer the cause for trial, which motion is in words and figures as follows, to-wit:

51 (Omitting Formal Parts.)

Petition for Transfer of Cause for Trial to Another Division of the District Court of Kansas.

Comes now the above named defendant, Robert F. Stroud, and states to the court that he has been tried twice on the indictment herein, in Division One of the above court at Leavenworth, Kansas; that the members of the two juries that tried defendant heretofore were residents of Leavenworth County, Kansas; that deceased was a resident of Leavenworth county, Kansas; that at the trials afore-

said the newspapers of Leavenworth, all of which enjoy an extensive circulation throughout the county of Leavenworth and vicinity, printed extensive quotations of the testimony on the part of the government which tended to establish defendant's guilt of murder in the first degree, the truth of which defendant denied, and by his evidence and by the evidence of many witnesses disproved. But the testimony of the government prejudicial to defendant was printed and commented upon by the press, the tendency of which was to prejudice the minds of the inhabitants of Leavenworth county against the defendant and it did so prejudice said inhabitants against him; that at defendant's last trial the government, by issuing pardons to prisoners who claimed to have witnessed the homocide, produced only such witnesses as tended to support the government's theory of the guilt of defendant of the crime of first degree murder, and at the same time the government invoked the rule that prisoners in the penitentiary who witnessed the homocide, being still prisoners under conviction of felony and serving terms of more than one year
52 in said penitentiary were not qualified witnesses on behalf of defendant; the court sustained the objection of the government to the issuance of a writ of habeas corpus ad testificandum praying that nine witnesses who would testify to facts exhonorating the defendant of said charge of murder be produced in court to testify on behalf of defendant; that by reason of said objection of the United States District Attorney representing the government, sustained later by the court, defendant was denied an opportunity to demonstrate his innocence of murder, and the evidence published was only such as the government introduced, and its wide circulation throughout the country by the medium of the press, as heretofore stated, created prejudice in the minds of the inhabitants of the county against him, so that he can not have a fair trial in said county; that this prejudice exists to such an extent that the jury empaneled to try this case, though not inhabitants of the county, will be influenced more or less by the prejudice existing in said Leavenworth county, Kansas, against him; that both of said former trials were conducted in such a way as to bias and prejudice inhabitants of the county of Leavenworth against defendant, as hereinbefore set forth, and furthermore, in such a way that the government on writ of error in the first instance appeared by its attorney, Fred Robertson, Esquire, in the United States Circuit Court of Appeals of St. Louis, and in open court confessed that defendant Robert F. Stroud, did not have a trial in accordance with the constitution and laws of his country; and in the second instance, the United States appeared by the Solicitor General of the United States, to-wit. the Honorable John W. Davis, in the Supreme Court of the United States and confessed in open court that
53 the defendant did not have a trial in accordance with the constitution and laws of his country.

That this cause was set for trial at a special term of this court beginning on May 20th, 1918; that on said date defendant's counsel, to-wit, I. B. Kimbrell and Martin J. O'Donnell, were engaged in the trial of a cause in the Circuit Court of Jackson county, Missouri, a

court of general jurisdiction of that state, said cause being entitled, "Edward J. Lamport and Commerce Trust Company, plaintiffs vs. Ætna Life Insurance Company, defendant, No. 57345," and had been so engaged from the preceding 13th day of May, 1918; that defendant's said attorneys were and now are officers of the said court of Jackson county, Missouri, and that their presence was necessary at the trial of said cause and that it was impossible for said attorneys to be present in this court during the week beginning May 20th, 1918; that the United States District Attorney for the District of Kansas, on or about the 17th day of May, 1918, inquired of defendant's said attorneys concerning the probability of finishing the trial in which defendant's counsel were then engaged and was advised by them that it would not be finished during the week beginning May 20th, 1918; That defendant's said attorneys advised the Judge of this Court, of their inability to be present during the week of May 20th, 1918, sending John J. Cosgrove, Esquire, a member of the bar of Leavenworth, Kansas, and of the bar of Jackson county, Missouri, to state the facts to the court, and defendant's counsel also advised the said Judge in writing of their inability to be present during the week beginning May 20th, 1918, and of their readiness and willingness to participate in the trial at the conclusion of the trial in which they were engaged; that they advised their client, the defendant, through his mother, of their readiness and willingness to proceed with
54 the trial of the above cause *case* at the conclusion of the trial in which they were engaged. That the defendant's said attorneys prepared an affidavit, which affidavit was filed in this court on the 23rd day of May, 1918, reciting substantially the foregoing facts and praying the court not to enter upon the trial of this cause until his said counsel could be in attendance upon the court; that thereupon Fred Robertson, Esquire, dictated an affidavit to his stenographer which contained, among others, the following recitation: "this affiant further states he is personally well acquainted with the said Kimbrell and O'Donnell, and has at different times discussed said case and various features thereof personally with them. That said Kimbrell and O'Donnell both personally came to the office of this affiant in Kansas City, Kansas, upon Thursday, May 9, 1918. * * * said Kimbrell and O'Donnell then and there made known their wish and desire to escape further responsibility for the conduct of the defense of the defendant Stroud, and then and there expressed their hope that something would occur which would make it unnecessary for them to have to longer appear in this cause in his behalf. Said Kimbrell and O'Donnell then and there proposed that the government consent to have defendant Stroud plead guilty to the charge of second degree murder, with the understanding that as a result thereof the court might sentence the defendant to prison for the remainder of his life; * * *"

That said statements and recitations verified by the United States District Attorney, Fred Robertson, Esquire, were read in the presence and hearing of the special panel of prospective jurors in open court, on the said 23rd day of May, 1918, said jurors being among those

before whom the government proposes to put the defendant upon trial for his life; that at the close of the reading of said affidavit
55 in the presence of said prospective jurors, the Honorable Robert E. Lewis, in the hearing and presence of said prospective jurors, stated from the bench that, "in view of what Mr. Robertson has set forth in his affidavit as to his conference with Kimbrell and O'Donnell, I am compelled to feel that they acted unprofessionally in not being here this morning,—at least one of them,"

That the matters and things set forth in said affidavit of District Attorney Robertson and the said statement of the court in the hearing of the prospective jurors prejudiced said jurors against defendant and against said attorneys so that it is impossible for the men who heard said affidavit and said statement to the court to constitute a fair and imparial jury of the state and district of Kansas such as the Sixth Amendment to the Constitution of the United States contemplates.

That said affidavit and said remarks were made in the hearing of inhabitants and residents of Leavenworth county, Kansas, and were quoted and commented upon in the public press in Leavenworth county, Kansas, and created a prejudice in the minds of the inhabitants of Leavenworth county, Kansas, and of the First Division of the District of Kansas against said defendant and his said attorneys.

And said defendant states that he never at any time or place or under any circumstances authorized any person or attorney to make any such proposition concerning a plea of guilty in his behalf to the United States District Attorney or to any other officer of the government for the reason that defendant is not guilty of the charge contained in the indictment, or of murder in any degree; and defendant further states that his said attorneys never attempted to escape further responsibility for the conduct of the defense in this case, and said defendant points to the records of this court, of the United
56 States Circuit Court of Appeals, and of the Supreme Court of the United States in this cause and concerning this cause as evidence that they have hitherto faithfully and promptly represented this defendant.

That by reason of the prejudice created against the defendant in Leavenworth city and county by the above mentioned conduct on the part of the government, and by reason of the prejudice existing against the said defendant in the minds of the inhabitants of said county and city, the jurors, who have heretofore attended this court during the week of May 20th, 1918, and who must sit to try this cause unless they are discharged by order of this court, defendant cannot enjoy the right to a public trial by an impartial jury of said district of Kansas; and defendant now invokes the right secured to him by the sixth amendment to the Constitution of the United States to a trial by an impartial jury of said district; that unless this cause be transferred for trial from the first division of the District of Kansas to some other division of said district defendant cannot have a trial such as the constitution contemplates.

Wherefore defendant respectfully prays this court to order that this case be transferred for prosecution to another division of the Dis-

trict of Kansas because of the prejudice above mentioned and now existing in the minds of the inhabitants of Leavenworth county against defendant and because of the prejudice engendered in the minds of the prospective jurors and panel now in attendance on the court against defendant and his said attorneys by reason of the matters and things above set forth. And defendant prays the court to grant him leave to introduce evidence in addition to his affidavit in support of the allegations thereof.

KIMBRELL & O'DONNELL.

STATE OF KANSAS,
County of Leavenworth, ss:

Robert F. Stroud, of lawful age, being duly sworn, upon his
57 oath states that he has read the above and foregoing petition for transfer of this cause, and that the matters and things therein set forth are true according to his knowledge, information and belief.

(Signed) ROBERT F. STROUD.

Subscribed and sworn to before me this 24th day of June, 1918.

[Seal of the District Court of the United States for the District of Kansas.]

(Signed) F. L. CAMPBELL,
Clerk.

And the court having duly considered the motion last set out, did rule thereon as follows:

The Court: The motion will be overruled, except so far as it asks for the exclusion of the inhabitants of Leavenworth county as jurors; to that extent it will be sustained.

And to this ruling and action of the Court defendant then and there duly excepted, and still excepts.

Defendant then asked leave of court to file his motion to quash the panel, which permission was by the Court granted, and defendant did then and there file such motion to quash the panel, which is in words and figures as follows, (omitting formal parts) to-wit:

58 *Motion to Quash the Jury Panels.*

Now comes the above named defendant and states to the court that on the 15th day of April, 1918, this court ordered the Marshal thereof to summon before the District Court of the United States for the District of Kansas to be held at Leavenworth, in said District on Monday, the 20th day of May, 1918, at ten o'clock A. M., fifty persons selected and drawn to serve as petit jurors in said court and issued a duly certified writ to said Marshal, a copy of which is hereto attached and marked Exhibit "A", and thereafter and on the 20th day of May, 1918, an additional writ was issued by his court directed to the Mar-

shal thereof commanding him to summon and cause to come before this court at 9:30 A. M., on the 23rd day of May, 1918, sixty additional named persons selected and drawn to serve as petit jurors in said court; that a copy of said writ issued on May 20th, 1918, is hereto attached and marked Exhibit "B".

That persons named in said writs were present in the District Court of Kansas for the first Division of said District on the morning of May 23rd, 1918, and in the presence and hearing of said persons, the affidavit of Fred Robertson, Esquire, United States Attorney for the District of Kansas, opposing defendant's application for a continuance, was read, said affidavit was duly filed herein is part of the records of this court, and is made a part hereof.

That thereafter and upon the reading of said affidavit, certain remarks were made by the Judge of this Court and certain statements of fact reflecting upon the defense and defendant's counsel were made by the Judge of this court in the presence and hearing of said persons, a copy of which remarks and statements *are* hereto attached and marked Exhibit "D".

59 That said remarks were commented upon and partially quoted in the Leavenworth Times, same being a newspaper published and circulated throughout the District of Kansas, which said quotations and comments thereon in said Leavenworth Times are hereto attached and made a part hereof, the part of said newspaper in which same were published is hereto attached marked Exhibit "E."

That the said affidavit of said District Attorney, said remarks of the court, said quotations and comments thereon in the public press, having been publicly communicated to said persons in open court and through the press, have created a prejudice in the minds of said persons against the defendant and his counsel named in the affidavit of said District Attorney, so that said persons are incapable of acting as a fair and impartial jury to try the issues in this cause, and cannot constitute a fair and impartial jury of the State and District of Kansas before which the government proposes to put defendant on trial for his life; and cannot constitute such impartial jury as the Sixth amendment of the Constitution of the United States requires.

And said defendant states that he never at any time or place or under any circumstances authorized any person or attorney to make any proposition concerning a plea of guilty on his behalf to any United States District Attorney or any other official of the government, and said defendant denies that he is guilty of the crime charged against him in the indictment; and defendant states that his said attorneys never attempted to escape further responsibility for the conduct of the defense in this case. Defendant further states that said remarks in the affidavit of said District Attorney were

60 unjustifiable and unwarranted and were made for the purpose of prejudicing the proposed jurors against this defendant and is an attempt on the part of said District Attorney to obtain a conviction in this cause contrary to the provisions of the Constitution and laws of these United States.

And said defendant respectfully shows to the court that said District Attorney has on two former occasions conducted trials on the indictment herein against this defendant and that said defendant was compelled to prosecute writs of error from judgments of conviction improperly and unlawfully obtained against this defendant by means not authorized by the constitution and laws of these United States and that said Fred Robertson, Esquire, was compelled to appear in the United States Circuit Court of Appeals for the Eighth Circuit sitting at St. Louis, Missouri, on or about the 20th day of December, 1916, and to confess in open court that this defendant did not have a trial as provided by the Constitution and laws of these United States; that thereafter the said Fred Robertson, Esquire, conducted a trial on the indictment herein against this defendant at a special term of this court sitting at Leavenworth and so conducted the same that defendant was compelled to prosecute a writ of error to the Supreme Court of the United States from a judgment of conviction unlawfully obtained against this defendant and that thereafter, on or about the 4th day of February, 1918, the United States Solicitor General, the Honorable John W. Davis, appeared in said Supreme Court of the United States and confessed and admitted that the said trial conducted by the said District Attorney of Kansas was so conducted that the defendant did not have a trial in accordance with the Constitution and laws of these United States and confessed that error was committed against this defend-
61 ant in the trial of said cause.

And defendant says that to put defendant upon trial for his life on the charge contained in the indictment by reason of matters and things aforesaid, would be to deny to defendant the right to a trial by an impartial jury of the State and District of Kansas as contemplated in the Sixth amendment to the Constitution of the United States and would be to deny to defendant that due process of law which provides that no person shall be deprived of life or liberty secured to the defendant by the Fifth amendment to the Constitution of these United States.

Wherefore defendant respectfully prays this court to quash the writs aforesaid summoning the persons therein named to serve as petit jurors at the trial of this cause, and to quash said panels and discharge said persons from attendance upon this court during the trial of this cause.

And defendant offers in addition to this affidavit to introduce evidence in addition to his affidavit in support of the allegations of this motion.

(Signed) KIMBRELL AND O'DONNELL,
Attorneys for Defendant.

STATE OF KANSAS,
County of Leavenworth, ss:

Robert F. Stroud, of lawful age, being duly sworn, upon his oath states that he has read the above and foregoing motion to quash the

jury panels, and that the matters and things therein set forth are true according to his knowledge, information and belief.

62 (Signed) ROBERT F. STROUD.

Subscribed and sworn to before me this 24th day of June, 1918.

[Seal of the Dist. Ct. of the U. S. for the Dist. of Kans.]

(Signed) F. L. CAMPBELL,
Clerk.

(EXHIBIT A.)

UNITED STATES OF AMERICA,
District of Kansas, ss:

THE UNITED STATES OF AMERICA:

To the Marshal of the United States for said District, Greeting:

You are hereby commanded to summon and cause to come before the District Court of the United States for the District of Kansas, First Division, to be held at Leavenworth in said District on Monday the 20th day of May, 1918, at 10 o'clock A. M., the following named persons selected and drawn to serve as petit jurors in said court:

H. A. Shearer, Frankfort, Kans.
A. D. Buffington, Jewell, Kans.
Chester Moore, Mayette, Kansas.
Frank Johnson, Olathe, Kans.
W. F. Dixon, Junction City, Kans.
J. S. Norman, Troy, Kans.
Chalon Guard, Beloit, Kansas.
E. L. Finegan, St. Francis, Kans.
A. Still, Woodston, Kans.
W. J. Kinsley, Marysville, Kans.
Joseph Oberding, Seneca, Kans.
A. B. Sharpless, Atchison, Kansas.
Charles W. Simmons, Ottawa, Kans.
63 C. C. Wallace, Brookville, Kans., R. R. 4.
William Tanner, Piper, Kans.
Wm. McCormell, Denison, Kans.
E. W. Bardwell, Manhattan, Kans.
C. W. Wilson, Salina, Kans.
John A. Basgall, Hays, Kans.
W. A. Leichliter, Clayton, Kans.
Abe Snyder, Webster, Kans.
F. L. Shields, St. Francis, Kans.
F. F. McCloskey, Osage City, Kans.
Ben Talbot, Plymouth, Kans.
W. G. Smith, Junction City, Kans.
H. L. Hiskey, Hiawatha, Kans.

Robert Gregg, Fall Leaf, Kans.
John V. Kelly, Leavenworth, Kans.
B. B. McReynolds, Plainville, Kans.
Carl Lowery, Smith Center, Kans.
John R. Young, Marion, Kans.
J. H. Bruns, Langford, Kans.
C. I. McGregor, Olivet, Kans.
John Doyle, Junction City, Kans.
Frank Mangelsdorf, Atchison, Kans.
Will Myers, Beloit, Kans.
M. M. Davis, Manhattan, Kans.
B. F. Pearl, Wakefield, Kans.
M. B. Houdek, Agenda, Kans.
R. W. Trimble, Selden, Kans.
N. C. Bracken, Phillipsburg, Kans.
Jared C. Fox, Atchison, Kans.
George Cragg, Manhattan, Kans.
Irving Hill, Lawrence, Kans.
64 E. L. Carson, Clifton, Kans.
Carl Parker, 1201 Southwest Blvd., Rosedale, Kans.
J. E. Vawter, Oakley, Kans.
Allen Mansfield, Ottawa, Kans.
Clarence Morton, Goodland, Kans., R. F. D. # 2.
D. C. Campbell, Oberlin, Kans.

And have you then and there this writ, with your return duly endorsed thereon.

UNITED STATES OF AMERICA,
District of Kansas, ss:

I, F. L. Campbell, Clerk of the District Court of the United States of America for the District of Kansas, do hereby certify that the within and foregoing to be a full, true and correct copy of the orginal petit jury venier issued for the special May term, 1918, at Leavenworth, Kansas, May 20th, 1918.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Topeka in said District of Kansas, this 15th day of April, 1918.

(Signed) F. L. CAMPBELL,
[SEAL.] *Clerk.*

(EXHIBIT B.)

UNITED STATES OF AMERICA,
District of Kansas, ss:

THE UNITED STATES OF AMERICA:

To the Marshal of the United States for said District, Greeting:

You are hereby commanded to summon and cause to
65 come before the District Court of the United States for the District of Kansas, First Division, now in session at Leaven-

worth, in said District, on Thursday, the 23rd day of May, 1918, at 9:30 o'clock A. M., the following named additional persons selected and drawn to serve as petit jurors in said court:

R. L. Jaques, Hiawatha, Kans.
Harley M. Farr, 1017 Ann Ave., Kansas City, Kans.
D. F. Whittaker, Troy, Kans.
Ham, Kent, Sr., Troy, Ks.
Nathan T. Eglin, Hamlin, Ks.
Frank Thompson, Irving, Ks.
William Katz, Seneca, Ks. R. F. D. 1.
C. E. Eldridge, Topeka, Ks.
Richard Roenick, Morganville, Ks.
T. M. Jones, Abilene, Kans.
Elmer Williamson, Washington, Ks.
Harry Adams, Cordell, Ks.
C. E. McKinney, Glen Elder, Ks.
George Lipe, Salina, Ks., R. F. D. 5.
A. E. Crudell, Miltonvale, Ks.
J. E. Edgerton, Manhattan, Ks.
William A. Osterhold, Holton, Ks.
Claude Postal, Winona, Ks.
A. R. Banks, 705 Fillmore, Topeka, Ks.
A. L. Rundale, Clyde, Ks.
William Pfile, Palmer, Ks.
S. S. Christian, Atchison, Ks.
L. C. Jones, Ottawa, Ks.
Charles Bradshaw, Herington, Ks.
Henry Craven, Council Grove, Ks.
66 E. S. Ferguson, Valley Falls, Ks.
Fred Layton, Jamestown, Ks.
James Nelson, Waterville, Ks.
H. W. Pierce, Junction City, Ks.
R. T. Stokes, 1125 Quindaro, K. C. Ks.
Stewart Woolford, Blue Rapids, Ks.
L. L. Allis, Manhattan, Ks.
C. C. McCammon, Mankato, Ks.
William Rork, Muscotah, Ks.
L. E. Brent, Otego, Ks.
J. F. Moherman, 275 N. 7th St., K. C., Ks.
Elmer D. Manley, Ottawa, Ks.
Mike Forest, Troy, Ks.
Edward F. Heim, 60 Grandview, K. C., Ks.
W. O. Liter, Salina, Ks.
S. B. Stewart, Reserve, Ks.
John H. Brown, Holton, Ks.
John A. Putnam, Atchison, Ks.
J. W. Bret, Meridian, Ks.
Clyde Kiler, Ottawa, Ks.
Otto Strahl, White City, Ks.
George M. Casebier, McLouth, Ks.

R. A. Mather, Horton, Ks.
Dick Hays, Cottonwood Falls, Ks.
E. S. Dean, Oberlin, Ks.
T. J. Fletcher, Powhatan, Ks.
G. D. Hershbarger, Manhattan, Ks.
H. L. Wright, Lebanon, Ks.
R. E. Coffinck, Manhattan, Ks.
E. M. Cook, Monument, Ks.
Fred Legler, Valley Falls, Ks.
E. E. Schlatter, McPherson, Ks.
67 William Babst, Junction City, Ks.
W. B. Ayers, Keats, Ks.
J. F. Maserve, Ellis, Ks.

And have you then and there this writ with your return duly encorsed thereon.

Witness, the Honorable John C. Pollock, Judge of said Court, and the Seal thereof, at Topeka, in said District of Kansas, this 20th day of May, 1918.

(Signed) F. L. CAMPBELL,
[SEAL.] *Clerk.*

UNITED STATES OF AMERICA,
District of Kansas, ss:

I, F. L. Campbell, Clerk of the District Court of the United States of America for the District of Kansas, do hereby certify the within and foregoing to be a true, full and correct copy of venire for additional petit jurors for the special May, 1918, term of Court at Leavenworth, Kansas.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Leavenworth in said District of Kansas, this 21st day of May, 1918.

(Signed) F. L. CAMPBELL,
[SEAL.] *Clerk.*

(EXHIBIT D.)

In the District Court of the United States for the District of Kansas, First Division.

UNITED STATES OF AMERICA, Plaintiff,

v.

ROBERT F. STROUD, Defendant.

68 Before Honorable Robert E. Lewis, Judge.

Appearances:

For the Government: Mr. Fred Robertson.
For Defendant: Messrs. Benj. F. Andres, John T. O'Keefe, and W. W. Hooper.

LEAVENWORTH, KANSAS, May 23, 1918.

9:30 a. m., May 23, 1918.

The Court: Is the government ready this morning?

Mr. Robertson: Yes, your Honor.

The Court: Defendant ready?

Mr. Andres: I desire to announce that co-counsel whom you have appointed to assist in the defense of the defendant, Mr. Hooper, is necessarily absent from the city this morning; he had a stockholders' meeting of some railroad company he represents in Kansas City, but he said that he would be back at noon, and I merely want to announce that.

The Court: Are you ready to empanel the jury?

Mr. Andres: Not just now, your Honor. I have an affidavit here for a continuance, that I am filing at the request of the attorneys, the regular attorneys for Mr. Stroud, and I will read it and then file it.

The Court: I don't consider those gentlemen any longer Mr. Stroud's attorneys in the trial of this case; their conduct is such that I don't think they ought to be recognized.

Mr. Andres: I talked with Mr. Kimbrell last night about 12 o'clock over the phone, and asked him what the condition of the case he is now engaged in is; and he said it was still on; they were making every reasonable effort to conclude the trial of the case at the earliest date possible, and he didn't think the case would be concluded this week.

69 The Court: Yes; there are two of them.

Mr. Andres: Both Mr. O'Donnell (interrupting)——

The Court: I wrote Judge Seehorn after receiving his letter saying he hoped to get through with the case Wednesday night, and told him if anything occurred they didn't, at least one of them should be here this morning, and undoubtedly with two attorneys in a case, participating in a trial there as long as they have, there is not any reason why one of them, if they cared to defend this man, should not be here this morning. So I don't regard them any longer as counsel in the trial of this case, and so I told Mr. O'Keefe yesterday.

Mr. Andres: This affidavit, your Honor, is signed by the defendant Stroud.

The Court: You may read it.

Mr. Andres, reading the affidavit.

The Court: Now, Mr. Robertson, if you desire to resist the motion, I think you should file a counter affidavit, setting out all that has occurred since this case was called Monday morning including this correspondence.

Mr. Robertson: I think, your Honor, that a showing should be made on the part of the government here, showing what has occurred and a history of the matter. I would ask your honor for a reasonable time in which to prepare this sort of a showing.

The Court: You cannot satisfactorily dictate it now to the stenographer?

Mr. Robertson: It seems to me I would rather put it in the form of an affidavit and verify it.

The Court: How long will it take you to do that?

Mr. Robertson: It would not take me very long if our type-writing machine is here. My stenographer is here, don't know
70 whether our writing machine is here or not.

The Court: You can dictate it and the Stenographer can read it from his notes and transcribe it some time during the day.

Mr. Robertson: I understand there has been some correspondence, your Honor, between Kimbrell and O'Donnell, the former attorneys for the defendant, and possibly yourself, and I understand with some one or more members of the bar that your Honor appointed last Monday to represent the defendant. This correspondence I have not access to, and I only know what it is from hearsay; and I understand it is to the effect that Kimbrell and O'Donnell announce that they are no longer counsel in this case anyway. I would like very much to see this correspondence, if it is not improper.

The Court (to Mr. Andres): Have you the letter to Mr. O'Keefe?

Mr. Andres: I don't know whether this is the original or copy, Mr. O'Keefe handed me a letter from Kimbrell and O'Donnell, and there is nothing in the letter that says that they are not any longer connected with the trial of the case. There are some matters in here that I really believe are privileged, that is to the extent that I would not like to have Mr. Robertson read all that is in this letter, but the matter I don't want you to read, I assure you does not state that they are no longer connected with a trial of the case.

The Court: It is impossible for me to understand why one of those gentlemen could not be here this morning, if they desired to continue to defend Stroud. There is not any explanation can be given of that. Undoubtedly for some reason, they don't care to appear further. Mr. O'Keefe told me yesterday that Mrs. Stroud had
71 been to see them and when she returned she came to see him and that Mr. O'Keefe was in consultation with defendant on Wednesday and had an appointment to see him yesterday. I furnished Mr. O'Keefe the copy of the bill of exceptions on the first trial, and I think he told me he already had a copy of the testimony taken on the second trial.

Mr. Andres: If your Honor please, I want to state to you that I first started to consult with Mrs. Stroud on Tuesday evening about 5 o'clock. We made an engagement with Mr. Fletcher, the deputy warden, to let us see Mr. Stroud at the Federal prison Tuesday evening, and he was very courteous to us, extending us a private interview with our client and offered every assistance possible; didn't interfere with us in any way whatever and allowed us to remain there until 20 minutes after nine. All day yesterday we were in consultation with Mrs. Stroud and she very willingly answered every question that we put to her, and tried to get us in shape to try this case, and the result of our efforts yesterday is in front of me now—these law books, as you see. We have some matters to present to the court; but the defendant wanted us to present this affidavit for a continuance.

The Court: Very well.

Mr. Andres: I assure the court Mr. O'Keefe, Mr. Hooper and I were busy all day yesterday to try to get ourselves in shape to do the very best we can for this man. I don't see Mr. O'Keefe here, I suppose he will be here in a few minutes.

The Court: Mr. Robertson, you can take 20 or 30 minutes to get your affidavit in shape. The jurors will remain about the court room for 20 or 30 minutes until we are ready to take further steps.

Mr. Andres: Your Honor, do you desire me to turn over to Mr. Robertson a letter to Mr. O'Keefe received from Mimbreil and
72 O'Donnell dated May 21st, 1918?

The Court: I don't recall the contents of that letter; I don't see why you should not turn it over; you may turn it over to Mr. Robertson.

Mr. Andres: To which order the defendant excepts.

Mr. Robertson: In view of that, I will withdraw my request for the letter, and direct the stenographer to return the same to Mr. Andres.

(Recess of Court.)

Mr. Robertson: If the Court please, I have dictated an affidavit to my stenographer, Mr. Stickel, and if your Honor will permit it, I would like to have him read it, and later it will be reduced to writing and signed and filed.

Mr. Andres: Before counsel proceed in their showing, if your Honor please, we will introduce a letter that was just received from the attorneys for Stroud.

The Court: Attach it to your affidavit and motion.

(Letter and exhibit referred to identified as Exhibits "1" and "2" and are attached to motion and affidavit of defendant.)

(Reading affidavit of Mr. Robertson.)

The Court: Let me see the affidavit of the defendant, Mr. Andres, where was this affidavit of Stroud's prepared?

Mr. Andres: It was prepared as I understand it, by either Mr. O'Donnell or Mr. Kimbrell and brought to Leavenworth by a young lawyer by the name of John Cosgrove of Kansas City, Missouri, and handed to Robert F. Stroud who handed me the affidavit this morning for the first time, to file in this case.

The Court: Do you and Mr. O'Keefe and Mr. Hooper feel that you are now fully prepared to protect the defendant in all of his rights?

73 (Mr. Andres, replying to the Court's inquiry.)

(The reply of Mr. Endres appears at Page 35 of this Bill of Exceptions.)

The Court: How do you feel, Mr. O'Keefe, as to your present ability to protect the defendant in his rights?

(Mr. O'Keefe, replying to the inquiry of the Court.)

(The reply of Mr. O'Keefe appears at Page 36 of this Bill of Exceptions.)

The Court: Well, I feel that the court is under duty to express its appreciation of the services of Mr. O'Keefe and Mr. Andres, but I feel that the Kansas City counsel, Mr. Kimbrell and Mr. O'Donnell are subject to very severe criticism for their conduct. They were not here Monday morning. Judge Seehorn of Kansas City, wrote me a letter saying they were engaged in a trial before him, a civil case, and that he felt sure it could be closed by Wednesday night and they could be here this morning. I wrote Judge Seehorn that we had continued the case on his statement that Kimbrell and O'Donnell would be here this morning, and said to him if by any possibility that case should not close Wednesday night, that I would expect at least one of them here this morning; and I am not willing to believe that it was impossible for one of them to be here now. In that case, according to Judge Seehorn's letter, it had been on trial for a week or more; it is a civil case; it could not be of such a character that both of these counsel are compelled to constantly remain in Kansas City. In view of these facts, and in view of what Mr. Robertson has set forth in his affidavit as to his conference with Kimbrell and O'Donnell, I am compelled to feel that they have acted unprofessionally in not being here this morning, at least one of them. But whatever may be said about the defendant's counsel, it is the duty of the court to see that his rights, given him by the law, are not jeopardized by their conduct in this respect. The important thing in that regard that impresses me, is the statement of Mr. Andres
74 and Mr. O'Keefe that they do not feel thoroughly confident of their present ability to protect the rights of the defendant in an important trial. It is, of course, unfortunate, and has been quite expensive to the government, to bring witnesses here, some from a distance, and not proceed now with the trial of this case. Another large item of expense to the government is the fees and mil-age and per diem of the jurors, and beyond that, the great inconvenience to them to leave their homes and come here and not be able to discharge the public duties they owe as jurors. But I doubt the propriety and feel it would be likely to be considered an abuse of discretion of the court, under all the facts that have been presented, to force the defendant now to a trial in view of the serious charge against him. I am willing to come back and try this case when my convenience will permit. I would not be disposed to take this course except from the fact that Judge Pollock does not seem to be willing to try the case, and for that reason only, feeling that he might be considered by some as disqualified, although he didn't feel that he was disqualified, I was asked to hear it. I can arrange my other engagements so as to return on the 24th of June, or the 8th of July, or the case may go over until the next regular term, as counsel and the convenience of jurors may best serve. Would either of those dates afford you gentlemen sufficient time to interview these witnesses and prepare yourselves for the complete defense of the defendant?

Mr. Andres: Yes, your Honor, if the other lawyers do not come in and defend; we will set about interviewing them.

The Court: I will have to ask you to assume that they will
75 not appear.

Mr. Andres: Then, under the order of the court, we are to stand appointed and to prepare for the trial of the case in any event?

The Court: Yes, even if they come, I desire your appearance in the case.

Mr. Andres: I want to say to the court, I realize the great responsibility and appreciate the very high compliment the court pays me in assigning me to such an important duty, and I will do the best I can.

The Court: I am sure you and Mr. O'Keefe can protect him as fully as his former counsel if you shall have sufficient time to prepare yourselves.

Now, Mr. Robertson, what date would you suggest, or would you prefer to have it go over to the October term?

Mr. Robertson: Your Honor, I want to try the case at the earliest possible moment.

The Court: Which of these dates, June 24 or July 8, would best suit these jurors, particularly those who are farmers?

Mr. Robertson: Well, I hardly know how to answer that, your Honor. They would know better, I am sure, than I would, they are here.

The Court: Either of those dates suit you?

Mr. Robertson: June 24 would be the better date.

Mr. Andres: That is satisfactory to me, your Honor.

The Court: That would give you ample time, Mr. O'Keefe, you and Mr. Andres?

Mr. O'Keefe: So far as time is concerned, your Honor, it will do.

The Court: You can take out your writs, the subpœnas for
76 witnesses in the mean time, and if you desire to get the evidence of any non-resident, you can take his deposition if you cannot procure his attendance.

Mr. O'Keefe: I would judge from the letters the gentlemen in Kansas City have written that they have been engaged to be here at the next trial of the case.

The Court: Well, I am not going to depend upon them; if they lived in the State of Kansas, it would be a very different situation; I would have sent the marshal after them before this.

Mr. Robertson: It might readily run into this situation, your Honor, and if we did, we would not be a bit better off June 24 than now, they being absent and the defendant himself attempting to repudiate those whom you attempted to appoint to represent him. And it might put your Honor in just as embarrassing a situation at some future date as today.

The Court: Yes, we are not going to depend on them at all.

If the defendant procures their presence, we will hear them, but we are not going to expect them to represent him. * * *

The Court: The witnesses and jurors understand, counsel have

agreed this case should be continued until the 24th of June, that happens to suit the convenience of the court. We will begin the trial of the case at 9:30 a. m., June 24. The court may be adjourned until that date.

(The reply of Mr. Endres to the inquiry of the Court, referred to at the top of page 31, and which reply was not included in said "Exhibit D" is as follows:)

77 Mr. Endres: If your Honor pleases, I desire to explain my answer. We are as well prepared as we can be under the circumstances. It is true, as Mr. Robertson has stated in his affidavit, that when Robert F. Stroud was tried the first time, which I think was about two years ago, I represented a man by the name of Jones who was also charged with murder, and sat here in the court room awaiting the completion of the Stroud trial in order to go into the trial of the case against Jones, which was to follow. I heard some of the testimony in the Stroud trial, but, of course, I didn't charge my memory with it, and a great deal of the testimony has vanished from my memory. I don't feel, speaking for myself, owing to the importance of this case and the nature of the charge against the defendant, that I am as fully prepared to go to the trial of this case as I might be if given additional time. There are some thirteen witnesses whose name- were given to me for the first time this morning, and whose names are incorporated into a petition for habeas corpus ad testificandum with whom I have never talked. I have not even been informed as to the nature of their testimony; the defendant was reluctant about accepting our employment, but finally on Wednesday night, he did talk with Mr. O'Keefe and myself in the Deputy Warden's office in the Federal Penitentiary at Fort Leavenworth. I will say to the court that Mr. O'Keefe and I all day yesterday, Wednesday, May 22d, were in consultation with each other and also with Mrs. Stroud at my office, and we have endeavored, in good faith, to prepare ourselves to defend this defendant, and to do our duty toward him as lawyers. Mr. O'Keefe is in the court room.

(The reply of Mr. O'Keefe to the inquiry of the Court, referred to at the fourth line of page 31 and which reply was not included in said "Exhibit D" is as follows:)

78 Mr. O'Keefe: If your Honor pleases, since our appointment on Monday I have dropped my other work and given special attention to this case; and still, we had in mind the thought, that the Kansas City attorneys would be here on Thursday; we are informed this morning that they cannot be, that it is final. Now I found here on Monday that the defendant did not have a single witness here, no witness was subpœnaed by his attorneys, for the trial of this case. I find upon investigation that there are two or three important witnesses, away from here, one of them has written a letter to the defendant's mother stating that he would come here upon notice—he is in Iowa, I believe—whether we could get him

or not I don't know. There are two other important witnesses that should be here if the defendant has the means to procure their presence. I find the defense in this case will probably be self defense and plea of insanity. We have not had the time to confer with the witnesses in his behalf at the penitentiary. There are eight or nine men there we should consult with and see what they know about the case. One or two who were there at the time have gone out of the prison and I don't know where they are. Now, in regard to the insanity plea, there is not a single witness subpœnaed upon the part of the defense. I understand there were two or three important witnesses at the former trial of the case, Doctors, who are away from here and whom, perhaps, it would require means to get here. The defendant in the case has not a single dollar to procure those witnesses, or the presence of those witnesses, and she has not got a single dollar to give to us in the defense of the case at the present time. Now, upon investigation I find it is a very important case, and one that has twice before been before this court. I don't think I can say I feel myself in position to go into the case and defend it properly at this time. If we go on we will do our best, but if we
79 go into it, we are handicapped, and I don't think we could go into it and do the defendant the justice that regularly employed attorneys could give to it. That is the way I feel about it. I have had a good deal of experience in cases of this character for the last twenty-four years, and it would be throwing attorneys into the trial of a much contested case, an important case, which involves the life of this man, I think without proper preparation. Mr. Hooper who was appointed with us is not here this morning. He sent his son up to assist as far as he could.

(The affidavit of Mr. Robertson, read by Mr. Stickle, referred to at line 20 of page 29, and which was not made a part of said "Exhibit D," is as follows:)

80 (Entitled in This Cause; Title Omitted.)

Affidavit on Application for Continuance.

UNITED STATES OF AMERICA,
District of Kansas, First Division, ss:

Fred Robertson, being first duly sworn, on oath says:

That he is now and for more than three years just last past constantly has been the duly appointed, qualified and acting United States Attorney for the District of Kansas, and as such United States Attorney for and on behalf of the United States personally conducted the prosecution of the above entitled case, wherein the defendant was tried at Leavenworth, Kansas, during the month of May, 1916, and was again tried on the same charge during the month of May, 1917.

Affiant further states that the defense of defendant at said first

trial was conducted by L. C. Boyle and I. B. Kimbrell, attorneys at law of Kansas City, Missouri. Said trial resulted in a conviction, and an appeal was prosecuted therefrom by said I. B. Kimbrell and his business associate, Martin J. O'Donnell, also an attorney of Kansas City, Missouri, known as Kimbrell and O'Donnell. At the second trial of said cause so held in May, 1917, the defendant was represented by said Kimbrell and O'Donnell, who took an appeal from the conviction of defendant had at that time.

81 This affiant further states he is personally well acquainted with said Kimbrell and O'Donnell, and has at different times discussed said case and various features thereof personally with them. That said Kimbrell and O'Donnell both personally came to the office of this affiant in Kansas City, Kansas, upon Thursday, May 9th, 1918, for the purpose of discussing the approaching trial of this case, which they then and there well knew was expected to and would begin at Leavenworth, Kansas, upon May 20th, 1918. Said Kimbrell and O'Donnell then and there made it known they desired to enter upon the trial of a civil case in the Circuit Court of Jackson County, Missouri, upon May 13th, 1918, made known their desire that the case at bar be continued, and also then and there made known their wish and desire to escape further responsibility for the conduct of the defense of the defendant Stroud, and then and there expressed their hope that something would occur which would make it unnecessary for them to have to longer appear in this cause in his behalf. Said Kimbrell and O'Donnell then and there proposed that the Government consent to have defendant Stroud plead guilty to the charge of second degree murder, with the understanding that as a result thereof the court might sentence the defendant to prison for the remainder of his life; this proposition the Government did not agree to. Said Kimbrell and O'Donnell were then and there advised that the Government would be ready for trial at the time and place set, to-wit, ten o'clock A. M., May 20th, 1918, at Leavenworth, Kansas; that sixty jurors had already been summoned from various places in the state of Kansas, witnesses for the Government had been subpœnaed and were coming from various sections of the United States, arrangements had

82 been made for the Hon. Robert E. Lewis, Judge of the United States Court for the District of Colorado, to be present and preside at said trial, and that so great an expense had been incurred in this regard that the Government could not consent to a further continuance, but would have to insist on immediate trial.

Affiant further shows that upon April 3rd, 1918, this court entered an order calling a special term thereof to be held at Leavenworth, May 20th, 1918; that prior to the fixing of said date of said special term of court this affiant personally consulted with Messrs. Kimbrell and O'Donnell, and they then and there agreed that said date would be satisfactory to them, and that they would be ready for trial upon May 20th, 1918, if they could not get a continuance or change of venue or some other kind of a procrastination; that after said date of May 20th, 1918, had been agreed upon, and upon April 6th, 1918, formal notice was served upon said Kimbrell and

O'Donnell that the case of United States of America v. Robert F. Stroud, No. 4287, would be called for trial at Leavenworth upon May 20th, 1918.

Affiant further states this is not a case wherein it is necessary for counsel to take any extended time within which to make adequate preparation for trial. Further affiant states that the three members of the Leavenworth County bar appointed by the court to conduct the defense of defendant, said gentlemen being Ben F. Endres, John O'Keefe and W. W. Hooper, are already very familiar with the facts and circumstances of the case, said W. W. Hooper and Ben F. Endres having heard one of the former trials, and all three of said gentlemen living at all times during more than five years
83 just last past in the city of Leavenworth and State of Kansas, where the prison within which said offense was committed is located.

Affiant further states that from his acquaintance with said counsel so appointed for defendant, he personally knows that they are familiar with the facts to such an extent that they are capable of making a full and adequate defense for said defendant.

Affiant further states that the three gentlemen who heretofore and upon May 20th, 1918, were appointed by Your Honor to conduct the defense of defendant in this case are ready, willing and able to properly represent and protect the said defendant in his defense to the charge made.

Affiant further states that all three of said attorneys are men of wide experience and many years of practice at the bar of this court.

FRED. ROBERTSON.

Subscribed and sworn to before me this 23rd day of May, 1918.

[SEAL.] F. L. CAMPBELL,
Clerk.

(Marked:) Filed May 23, 1918. F. L. Campbell, Clerk.

84 (EXHIBIT "E.")

Stroud Gets Another Delay, Until June 24.

Leavenworth Lawyers Will Conduct His Defense When the Trial Starts at That Time.

Kansas Attorneys in Bad. Judge Lewis Criticizes Them in Open Court: If They Lived in Kansas, Would Send the United States Marshal After Them.

From Friday's Daily Times.

Robert F. Stroud, the Federal penitentiary convict who killed guard Andrew Turner in the dining room of the prison on Sunday March 17, 1916, got another delay in avoiding trial yesterday. An effort was made to throw the trial over to the regular term of the

United States District Court here in October, but this was strongly opposed by U. S. Attorney Fred Robertson and a special term of the Court will be held at the Government Building on June 24th, to start with his third hearing.

When court convened yesterday morning the announcement was made that Stroud was ready to accept B. F. Andres and John E. O'Keefe and W. W. Hooper, the three Leavenworth lawyers appointed by Judge Robert E. Lewis Monday to defend him. Andres and O'Keefe were in the court room at the table with Stroud and his mother.

These two lawyers stated that they were willing to defend Stroud, but asked for further time to get ready to do so. They mentioned that they ought to have at least a month and longer to prepare for a trial of this kind. It was also suggested that if another delay was granted that it was likely that the two Kansas City lawyers hired by Mrs. Stroud could probably be present to conduct the defense
85 of the prisoner.

Lets Farmers Decide.

Judge Lewis delivered a brief address in which he indicated that he was willing to grant a continuance and he mentioned that he could be back here from Colorado on June 24 or July 8, and would favor either one of these dates that would be most convenient, especially for the farmers who had been summoned on the jury. Three of the farmers on the jury finally said that they would cooner return on June 24 than July 8, and this date was then decided on. All the witnesses and jurors in the case were instructed to come back here on June 24 without further summons, to be ready to take part in the trial. This included the witnesses that are to testify for Stroud.

Judge Lewis took occasion to severely criticise the two Kansas City lawyers employed to defend Stroud. He said their conduct was unprofessional, and if they lived in Kansas within the jurisdiction of the court, he would send the United States Marshal out to bring them in. He said that these lawyers first sent word that they would be here Thursday and now they stated that they could not come this week. They were engaged in the trial of a civil case in a state court and he felt sure that at least one of them could have come here as was promised.

Would Not Depend on Them.

Judge Lewis told the Leavenworth lawyers to go ahead and prepare to defend Stroud, that he would not depend on the Kansas City lawyers. He didn't say that they would not be allowed to appear in the case, but Stroud is shrewd enough to recognize by this time that these Kansas City lawyers are not the ones that he now wants to look after his interests.

86 After the lawyer question was apparently settled, B. F. Endres started to take up some preliminary points in the

case and he said that they were ready to argue them now. The first one was to raise the question of jurisdiction to try Stroud in the Federal courts. He held that he should be tried in the State courts and incidentally in Leavenworth county. It was mentioned that hanging was the penalty for murder under the Federal laws and life imprisonment under the Kansas laws.

Judge Lewis did not pass on any jurisdiction questions but the drift of his remarks was to the effect that the Federal court was the one to try Stroud in and there is little doubt but this will be done. The jurisdiction question comes up in the trial of a prisoner charged with committing a crime on the reservation and it is always decided in favor of the Federal court.

(The motion and Exhibits thereto attached last above set forth were stamped as follows:)

Filed June 24, 1918. F. L. Campbell, Clerk.

87 And the Court having considered defendant's motion to quash the panels last hereinbefore set forth, overruled the same, and granted to the defendant an exception to such ruling and action.

And to this ruling of the Court in overruling such motion to quash the panel and to the ruling of the court in overruling defendant's request to introduce evidence in support of such motion, defendant then and there duly excepted and still excepts.

Mr. Robertson: I would like to ask counsel in connection with these motions a question or two on the witness stand; although your honor has passed on them. I would like to do this if you will permit me. One thing I want to show, the government's attention was not called to these motions until the moment they are presented to your Honor. And another thing, there is one or two items in this last motion evidencing their desire to have the jurors discharged, which probably the record will not explain. The purport of this affidavit is that new trials were granted in those cases because of unfair advantages taken by the prosecution over the defendant that made new trials necessary and forced the government to confess; that is the intimation and the burden and the innuendo, and in fact, the force of the motion, and I think counsel ought to be put upon the witness stand and asked to explain them.

88 The Court: I doubt if that is the purport of the motion. It says it affects the constitutional rights of the defendant at the trial. The constitutional rights of the defendant have been ignored by the prosecution as I take it. Comes down to a question of law more than anything, which you afterwards conceded was against you.

Mr. Robertson: Counsel for defendant understand full well, as no doubt your Honor does at this time, that new trial was granted in each case because of purely legal propositions and was no fault of anyone connected with the case, not even the fault of the court.

The Court: I don't think you need proof to establish that fact. Is there anything else?

Mr. Robertson: I want to make sure that the record shows that none of these motions were presented to the government until they were presented to your Honor for consideration, and they were not filed, as the record will show, until they were presented to your Honor.

Mr. O'Donnell: If the Court please, Mr. Andres and Mr. O'Keefe have filed a plea in bar to the indictment, and we think it is well taken, and would like to have Mr. Andres present it.

89 The Court: Very well.

And thereupon defendant's counsel presented to the court the plea in bar to the indictment theretofore filed, which is in words and figures as follow (omitting formal parts) to-wit:

Plea in Bar.

And now comes the defendant, Robert F. Stroud, and moves the court to dismiss this cause for the following reasons, to-wit:

1. That the facts stated in the indictment are not sufficient to confer jurisdiction upon this court of the subject matter therein stated, nor of the defendant.

2. That under the allegations set forth in the indictment, the offense therein charged, if committed at all, which the defendant denies, was committed within Leavenworth County, Kansas, and within the exclusive jurisdiction of the District Court of Leavenworth County, Kansas, and not within the jurisdiction of the District Court of the United States for the District of Kansas.

Wherefore, the defendant prays that this cause may be dismissed and that he may go hence without day.

PHILIP F. ENDRES.
JOHN T. O'KEEFE.
W. W. HOOPER.

(Marked:) Filed May 23, 1918. F. L. Campbell, Clerk.

Mr. Andres: Is your Honor going to hold us in this case?

90 The Court: If you see that you can be of any assistance to the defendant, I would be glad if you would render it. Of course, if you are not desired by his other cousel, you need not remain.

Mr. Kimbrell: We are very anxious to have these gentlemen assist in this case, and so is Mrs. Stroud; and we have offered to divide, our fee with them, to show our good faith, in the matter.

The Court: There is no action taken by the court on the motion filed by Mr. Andres when we were last here. It was a motion in bar.

Mr. O'Donnell: A plea in bar.

The Court: Plea in bar, on the ground that the government did

not have exclusive jurisdiction over the alleged place of the homocide. Is that the motion, Mr. Andres?

Mr. Andres: Yes sir.

The Court: It is overruled.

And to this action and ruling of the Court defendant then and there duly excepted and still excepts.

Mr. O'Donnell: Mr. Andres also filed a petition for a rule upon the district Attorney—the same petition referred to in and of the motions I filed—to return certain letters; and to save time in the disposition of that motion we ask the District Attorney to permit us to read the testimony that was offered, and is contained in the bill of exceptions, in support of that motion to be considered by the court.

91 (Which said motion or petition for a rule upon the United states District Attorney, Marshal and Clerk to return letters and papers, is in words and figures as follows (omitting formal parts), to-wit:

Petition for a Rule Upon the United States District Attorney, Marshall, and Clerk to Return Letters and Papers.

Now comes Robert F. Stroud, defendant herein and states that he is a citizen of the United States and a resident of the State of Kansas. That on and after the 20th day of March, 1916, the defendant was an inmate of the United States penitentiary at Leavenworth, Kansas, and after said date defendant, with the permission and authority of the government of the United States deposited certain letters with the government of the United States for transmission through the mails in accordance with the laws and rules of the United States applicable to the inmates of the said penitentiary; that thereafter certain officers of the government of the United States, whose names are unknown to this defendant, unlawfully and without warrant or authority to do so, broke open said letters and unlawfully and unreasonably seized some of them and made copies thereof in violation of the Fourth and Fifth Amendments to the Constitution of the United States of America. That the District Attorney, Marshal and Clerk of the United States District Court for the District of Kansas, took the above described letters so seized into their possession, and have failed and refused to return the same to the defendant. That said letters and papers are being un*al*wfully and improperly held by said District Attorney,

92 Marshal and Clerk inviolation of said defendant't rights under the Constitution of the United States of America.

That the said District Attorney proposes to use said letters and papers and copies of them at the present trial of the above entitled cause; and that by reason thereof, and of the facts above set forth, defendant's rights under the amendments aforesaid to the constitution of the United States, have been and will be violated unless the court orders the return of the letters and papers herein prayed for.

Wherefore defendant prays that said District Attorney, Marshal and Clerk be notified, and that the court direct and order said District Attorney, Marshal and Clerk to return said letters and papers and all copies thereof in their possession or under their control to the defendant.

BENJ. F. ANDRES.
JOHN T. O'KEEFE.
W. W. HOOPER.

STATE OF KANSAS,
Leavenworth County, ss:

Robert F. Stroud of lawful age being first duly sworn, on oath says: that he is the person whose name is subscribed hereto for return of papers and letters unlawfully siezed to be used as evidence against him in the above entitled cause; that he is familiar *to* the contents of said petition and that the matters and things therein contained are true to the best of his knowledge, information and belief.

(Signed) R. F. STROUD.

Subscribed and sworn to before me this 23rd day of May, 1918.

[Seal of U. S. Dist. Court, Dist. of Kans.]

(Signed) F. L. CAMPBELL,
Clerk.
By C. B. WHITE,
Deputy Clerk.

93 [Endorsed:] Filed May 23, 1918. F. L. Campbell, Clerk, by C. B. White, Deputy Clerk.

The Court: I know nothing about the facts in connection with that matter. * * * Have you the page of the record? I notice you desire to have some letters returned.

Mr. O'Donnell: Yes sir, on pages "9" to "42"—it is rather long; but the petition, the response of the government and the evidence in support is material.

(The pages herein referred to by Mr. O'Donnell appear to be pages copy of the Transcript of the Record filed in the Supreme Court of the United States.)

Mr. Kimbrell: We just offer that.

The Court: What is it, on page 9? The order of Judge Pollock on page 9?

Mr. O'Donnell: I believe it is on page 10, on the other side; the petition for a rule, your Honor; it commences at that point.

Mr. Robertson: If your Honor please, maybe I can save a little time by making a suggestion; if counsel will take the origi-

94 nal bill of exceptions here, that contains everything that was offered, and will offer it, pages "2" to "47" inclusive, I will make no objections to it upon that point. There was a good deal of time devoted to thrashing out that issue in the previous trial, on the question whether the District Attorney should be required to give them certain letters that the defendant wrote and under the rules of the prison were received by the Warden and turned over to me.

The Court: Those are the letters that the motion asks should be returned,

Mr. Robertson: Those are the letters.

The Court: What do you wish from the record of the previous trial?

Mr. Robertson: The entire record which consists of their motion, the District Attorney's answer, and all of the evidence upon the matter.

Mr. O'Donnell: Defendant offers in evidence in support of this petition, the original bill of exceptions, filed August 25, 1917, pages ——.

Mr. Robertson: Pages "2" to "47" contains it.

Mr. O'Donnell: Defendant offers in evidence in support of the petition, pages 2 to 47 inclusive of the Bill of Exceptions filed on August 25, 1917.

The Court: The Bill of Exceptions made on the last trial of this case?

Mr. O'Donnell: The Bill of Exceptions made on the last trial of this case.

95 The Court: Let me look at that.

Mr. O'Donnell: Pages 10 to 42.

The Court: I see no need of reading these letters now. We are not concerned now with the question of admissibility. I see they are set out here.

Mr. O'Donnell: Our position about the return of *of* those letters is, if your Honor please, that the Supreme Court of the United States has ruled that we cannot raise the question at the time they are offered, unless we make an issue before the trial, and that is the reason for presenting the petition at this time.

The pages of the bill of exceptions filed August 25, 1917, from 2 to 47 both inclusive, were received in evidence, and are in words and figures as follows, to-wit:

96 *Petition for a Rule upon the United States District Attorney, Marshal, and Clerk to Return Letters and Papers.*

Now comes Robert F. Stroud, the defendant in the above entitled cause, and states that he is a citizen of the United States and a resident of the State of Kansas. That on and after the 20th day of March, 1916, the defendant was an inmate of the United States Penitentiary at Leavenworth, Kansas, and after said date said defendant with the permission and authority of the Government of the United States,

deposited certain letters with the Government of the United States for transmission through the mails, in accordance with the laws and rules of the United States applicable to the inmates of said penitentiary; that thereafter certain officers of the Government of the United States whose names are unknown to this defendant, unlawfully and without warrant or authority so to do, broke open said letters and unlawfully and unreasonably seized some of them, and made copies thereof, in violation of the fourth and fifth Amendments to the Constitution of the United States of America. That the district attorney, marshal and clerk of the United States Court for the District of Kansas, took the above described letters so seized into their possession, and have failed and refused to return the same to defendant. That said letters and papers are being unlawfully and improperly held by said district attorney, marshal and clerk, in violation of defendant's rights, under the constitution of the United States of America.

That said district attorney proposes to use said letters and papers and copies thereof at the trial of the above entitled cause; and that by reason thereof, and of the facts above set forth, defendant's rights under the amendments aforesaid to the Constitution of the
97 United States have been and will be violated unless the Court orders the return of the letters and papers herein prayed for.

Whereiore defendant prays that said district attorney, marshal, and clerk, be notified, and that the Court direct and order said district attorney, marshal and clerk, to return said letters and papers and all copies thereof in their possession or unde rtheir control to said defendant.

I. B. KIMBRELL,
MARTIN J. O'DONNELL,
Attorneys for Defendant.

STATE OF KANSAS:
County of Leavenworth, ss:

Robert F. Stroud of lawful age, being first duly sworn, on oath says that he is the person whose name is subscribed to the foregoing petition for return of papers and letters unlawfully seized to be used as evidence against him in the above entitled cause; that he is familiar with the contents of said petition, and that the matters and things therein contained are true to the best of his knowledge, information and belief.

ROBERT F. STROUD.

Subscribed and sowrn to before me this 24th day of May, 1917.
[SEAL] F. L. CAMPBELL,
Dep. Clerk.

And to this motion or petition of the defendant, the Government of the United States then and there filed the following answer (omitting the title) to wit:

(Entitled in said Cause.)

Answer to Petition for Rule Upon United States Attorney, Marshal, and Clerk to Return Letters and Papers.

The undersigned United States Attorney for the District of
98 Kansas, making answer for the United States to the petition of defendant, alleges and shows to the Court, as follows:

That during the entire month of March and April, 1916, the defendant Robert F. Stroud, was a convicted felon, serving in the United States penitentiary at Leavenworth, Kansas, a sentence of twelve years imposed upon him by the United States Court for the District of Alaska, for the crime of manslaughter, committed in the District of Alaska, in the month of January, 1909, which sentence and judgment was pronounced against the defendant, in and by said Court, on August 23, 1909. That on account of being such convicted felon, so serving said sentence as aforesaid, which sentence defendant is still serving, the defendant during the month of March and April, 1916, had no civil rights and was not a person as contemplated by the fourth and fifth amendment- to the Constitution of the United States.

Plaintiff denies that it has withheld or is now withholding from the defendant wrongfully any letters as set forth in said petition whatsoever. The letters referred to in the petition of defendant were written by said defendant while incarcerated as aforesaid as a convicted felon in said penitentiary, addressed to others than himself, and by him voluntarily delivered to the officers of said penitentiary.

That none of said alleged letters were ever stamped with any United States postage stamp or stamps, and were never in the United States mails. Copies of said alleged letters and of the addresses and superscriptions on the envelopes in which same were intended to be placed, in all cases where envelopes were addressed, are hereto attached as "Exhibit A," and made a part hereof as fully as if rewritten herein. That at the time each and all of said letters were written by defendant he was confined in an isolation cell, in
99 isolation ward of said United States penitentiary at Leavenworth, Kansas. That under the rules and regulations governing said penitentiary and its officials, there in force, and under the laws of the United States, the writing and sending out of any such letters by said defendant at the time and times in question was not a right that he had and enjoyed; that all such letters were under the absolute control of the warden of said institution, and his subordinates, to be dealt with by said officers of said penitentiary as the ends of justice might warrant or require. That the said letters are each and all material testimony tending to show and showing the defendant guilty of the charge and charges made against him in the indictment in this case.

UNITED STATES OF AMERICA,
FRED ROBERTSON,
United States District Attorney for the District of Kansas.
L. S. HARVEY,
Assistant United States District Attorney.

UNITED STATES OF AMERICA,
District of Kansas,
First Division:

Fred Robertson being first duly sworn, on oath deposes and says that he dictated, is familiar with, and knows the contents of the above and foregoing answer; affiant further says that each and every statement contained in said answer is true, as he is informed and verily believes.

FRED ROBERTSON.

Subscribed and sworn to before me this 24th day of May A. D. 1917.

SEAL

F. L. CAMPBELL,
Dep. Clerk United States Court, District of Kansas.

100 (Attached to the foregoing answer to petition for rule upon the United States Attorney, Marshal, and Clerk, as "Exhibit A" thereto are copies of the letters and papers which constitute exhibits 5 to 21 inclusive of this bill of exceptions; and which, to avoid needless encumbering of the record are not repeated here. Said exhibits 5 to 21 are found at pages 468 to 502, inclusive, of this bill of exceptions and at — to —, inclusive, of the printed transcript of the record herein.)

To the answer of the plaintiff, the Government of the United States, to defendant's petition or motion hereinbefore set out, defendant filed the following rejoinder or reply (omitting formal parts), towit:

(Entitled in This Cause.)

Reply of Defendant.

Comes now the defendant and for reply to the answer of the Government to defendant's petition for a rule for return of letters and papers, denies said answer and each and every allegation therein contained.

I. B. KIMBRELL AND
MARTIN J. O'DONNELL,
Attorneys for Defendant.

STATE OF MISSOURI,
County of Leavenworth:

Robert F. Stroud being duly sworn says that he is the defendant herein, and that he has read the foregoing reply to the answer of the government to defendant's motion and petition for the return of letters herein, and that said reply is true to the best of affiant's knowledge, information and belief.

ROBERT F. STROUD,
Defendant.

Subscribed and sworn to before me this 24th day of May, 1917.

101 [SEAL.] F. L. CAMPBELL,
Deputy Clerk.

(Marked:) Filed May 24, 1917. Morton Albaugh, Clerk.

And thereupon, to establish the facts alleged in his said petition for a rule upon the United States District Attorney, Marshal and Clerk to return letters and papers and the issues made by the answer and rejoinder thereto, as hereinbefore set out, the defendant introduced and offered the following evidence:

L. J. FLETCHER, called as a witness on the part of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. O'Donnell:

Q. What is your business?
A. Deputy Warden of the United States Penetentiary at Leavenworth, Kansas.
Q. How long have you held that position?
A. Since April 1st, 1916.
Q. Were you in the institution prior to that date?
A. I was.
Q. In what capacity?
A. Special Agent in charge of the Bureau of Criminal Identification.
Q. Mr. Fletcher, do you know the method by which the inmates of that institution communicated with the outer world, their relatives, etc., during the months of March and April, 1916, and since that time?
A. They had writing privilege by which they could communicate—I say they had writing privileges.
Q. Yes sir, that is, they had writing privileges by virtue of which they wrote letters and gave them to the officers of the Government for transmission through the mails to their relatives?

102 By Mr. Robertson: That is objected to as leading.
By the Court: Overruled.

Q. What is your answer?
A. Yes.
Q. Now, during the months of March and April, 1916, you say that rule applied?
A. It applied to some of the prisoners, not all of them.
Q. Yes sir—in April, 1916, the defendant was under your charge, that is, March and April, 1916?
A. After April 6th, I think, when I took charge.

Q. Yes sir—and at that time, you may state whether he had that privilege?

A. He was permitted to write letters occasionally.

(By the Court:)

Q. You say "permitted to write them occasionally?"

A. Yes sir.

Q. So far as you know, that privilege had not been denied him during the month of April, 1916?

A. There was a restriction placed upon his writing privileges to the effect that all letters written by this defendant should pass through the warden's hands.

Q. But all lettters written by Mr. Stroud during those months were given by him to the officers of the Government for transmission through the mail?

A. They were transmitted by my office to the warden's office, after I took charge.

Q. All the employes in the institution during the months of March and April, 191-, authorized to receive those letters were officers of the government?

A. I don't understand you.

Q. I say, you may state whether or not all the employes in
103 the institution authorized to receive letters from prisoners under the rules were employes of or working for the Government?

A. All these letters written by the prisoners were supposed to be transmitted through the officers of the institution, of course.

Q. That is, they were supposed to be given to the officers of the institution for transmission through the mails?

A. They were given to the officers for such disposition as they thought best to make of them; if they desired to mail them they would, if not—not.

Q. The prisoner Stroud, at that time, when he gave a letter to an officer of the prison in accordance with this privilege, writing privilege, for transmission through the mails, so far as you know, assumed that it would be transmitted through the mails?

A. I could not say what he assumed.

Q. Well, it was given for that purpose?

A. He would naturally expect his mail to be inspected more closely than usual.

Q. He gave it for transmission to the addressee?

A. He gave it to the officers, I suppose, expecting that it would be forwarded, wishing that it would.

Q. You maintained a mailing place, did you?

A. Yes sir.

Q. And mail clerks there?

A. No, not mail clerks, civilian employes of the prison.

Q. Known as mailing clerks?

A. We called them clerks inside the prison for mails.

Q. What were their duties?

A. They were charged with the duty of inspecting this mail, enclosing it properly in envelopes stamping it, and sending
104 it out to the post office.

Q. A prisoner never stamped his letters?

A. No.

Q. It was intrusted to those men?

A. To employes of the institution.

Q. Officers to whom he gave it?

A. Yes.

Q. By "institution" you mean the penitentiary?

A. Yes sir.

Q. Mr. Fletcher, you had some arrangement by which you received ordinary mail sacks from the United States government?

A. We have our own mail sacks, not furnished by the post office.

Q. Furnished by the Government?

A. Well, we use some furnished by the Government.

Q. How is that?

A. Occasionally there would be some more than our mail sack would hold coming out, and then we were supplied by the post office.

Q. And those mail sacks were furnished—state whether or not those mail sacks were furnished by the Government?

A. Such extra sacks, such as paper sacks, etc., I supposed belonged to the Government.

Q. You may state whether or not the sacks used by the Government penitentiary there for carrying out this mail were sacks owned by the Government?

A. Of course they are all owned by the Government.

Q. Everything up there is owned by the Government?

A. Surely.

Q. Except the private belongings of the inmates, that is; you say those mail sacks were owned by the Government?

105 A. Yes, sir; the property of the penitentiary, that is the Government.

Q. And all these men that acted as mail clerks were paid by the Government?

A. Paid out of the appropriation for the penitentiary.

Q. And when you put mail in those sacks, did the postal authorities of the government take control of those sacks?

A. Not until it was turned over to the postal authorities.

Q. That is, it was turned over to the postal authorities and they took charge?

A. I suppose that when the mail reached the post office they would naturally take charge.

Q. Where were these sacks turned over to the Government?

A. They were generally sent to the post office; there is one mail a day, I believe, turned over to the rural carrier who passes that way, delivered to him at the edge of the reservation.

Q. He takes that sack issued by the penitentiary and carries it to the post office, that is, the rural mail carrier?

A. Yes, sir, whatever sack is delivered to him, he takes it.

Q. And sometimes those sacks belong to the post office department and sometimes to the penitentiary?

A. I have seen sacks out there that belonged to the post office department, such as paper sacks.

Q. What do you mean by "paper sacks"?

A. Ordinary sacks such as second class mail is transmitted in.

Q. Who would get the mail from the prisoners in the isolation cells and put that in the sacks?

A. Mail written by men in the isolation cells was taken up by the guard in that department.

Q. It was taken up by the guard?

106 A. Yes, and turned over to the deputy warden.

Q. And the guard is one of the officers of the prison?

A. Yes, sir.

Q. This mail is placed by the prisoner in a mail box?

A. In that department it would be handed directly by the prisoner to the guard.

Q. In other portions of the prison you maintain mail boxes wherein the prisoner deposits the mail?

A. Yes, sir, temporary boxes.

Q. And who were authorized to go to those boxes and get the mail?

A. Those boxes were not locked, generally. There is a clerk in charge of the mail room, or the manager would gather up the mail.

Q. And those boxes are marked U, S. Mail?

A. I think not.

Q. Are you sure about that, Mr. Fletcher?

A. In those boxes the prisoners drop any message they want to, maybe a note to the warden, message to the warden, a request for anything they want—anything of that kind.

Q. Those boxes are searched by these messengers from the mailing office, mailing room?

A. Whoever goes for the mail goes to those boxes.

Q. Who is this messenger?

A. In many cases the clerk probably take- up the mail himself not necessarily, all the time. A common way of gathering up those letters *in* for the cell house orderly to gather up those letters and take them down.

Q. And that is the method adopted by the Government by which the inmates of that institution communicate through the mails with their relatives or friends?

A. Yes, sir.

107 Q. You may state whether or not that same method was followed during the years 1916 and 1917?

A. Part of the year 1916 that was in vogue.

Q. And when did this system begin?

A. I could not say.

Q. You may state whether or not it was in vogue on the first of March, 1916?

A. I could not say as to that.

Q. Was it in vogue when you went there as deputy warden?

A. Practically the same system was; I think we made some boxes in the cell houses since then, different kind of boxes.

Q. What was the system in vogue in the month of March, 1916?

A. I could not say.

Q. Do you know whether or not any letters written by Mr. Stroud were turned over to you?

A. Yes.

Q. Or came into your possession?

A. Yes.

Q. And for what purpose were they turned over to you, Mr. Fletcher?

A. I suppose he wrote the letters for the purpose of having them sent out.

Q. In the mail?

A. Yes.

Q. Now you may state, Mr. Fletcher, whether or not those letters were turned over by Stroud to you or to the messenger and then given to you by the messenger?

A. They were turned over to the Guard in charge of the isolation building, and then turned over by him to me.

Q. What did you do with them?

108 A. I transmitted them to the warden. I turned them over to the warden.

Q. Would you be able to recognize the letters now, Mr. Fletcher?

A. I could identify the letters I handled.

Q. I believe you filed the letters and the Clerk has them?

(To the Clerk of Court:) Mr. Clerk, will you let me have them?

(The Clerk produces documents.)

Mr. Robertson: I will admit that certain letters were turned over by the defendant Stroud to Mr. Fletcher while he was deputy warden, or at least, while he was connected with the institution.

By the Court: Are the letters concerned in this inquiry, are those in there, or are they not?

By Mr. Robertson: They swear these are not the letters, but I have not any originals except those of which these are copies, and they swear they are not the ones.

The letters produced by the Clerk were here exhibited to the witness.

Q. Mr. Fletcher, you may state whether or not you received the originals of those copies, and if so, of whom?

A. I would not be able to identify the copy of a letter or any of the letters that passed through my hands; I could identify the original of it.

Mr. O'Donnell: We will ask the District Attorney to let the witness examine the originals of the letters in controversy.

The Court: Yes, he may let him examine the letters of which those are copies.

(The witness then examined documents produced by the District Attorney.)

109 A. Two of the letters passed through my hands.

Mr. Robertson: The Court is not in here now. (The Court having stepped into the Clerk's office.)

By the Court (returning): Have you examined them?
A. I have examined them and identify two letters turned over to me by Mr. Stroud.

(By Mr. O'Donnell, resuming:)

Q. You identify two as being received by you, Mr. Fletcher?
A. Each one of them has my signature on them.
Q. What was the name of your predecessor?
A. Mr. A. J. Reno.
Q. Is he in the Court room?
A. He is.

Mr. Robertson: If your Honor please, as far as the Government is concerned, there is no use taking up time with this one feature, for the government has always asserted and asserts now, your Honor, that the original letters of which copies are attached to our answer, were all delivered to some officer of the prison by Mr. Stroud.
The Court: I cannot anticipate what questions will be asked or answer given. Is there anything further from this witness?
Mr. O'Donnell: That is all.
The Court: Do you care to cross-examine this witness?
Mr. Robertson: Yes, I do.

Cross-examination.

By Mr. Robertson:

Q. I understand you to say that the letters, the writing of letters in the institution there is a privilege rather than a right?
A. That is my understanding.
110 Q. And that the officials of the prison may do whatever in their judgment is best with any letter written and handed them by a prisoner?
A. Yes sir.
Q. What if an obscene letter was written and delivered to you, what would you do with that?
A. It would be filed.
Q. Are not you prohibited, under the rules of the prison, from giving any one else other than an officer of the law, any letter giving information about the commission of a crime?
A. Yes sir, we are.
Q. If a letter giving information about the committing of a crime comes into your hands from one of your convicts, you do that, don't you?

A. Yes sir.

Q. Do the post office authorities of the United States enter that prison in any way?

A. No sir.

Q. Do they have any representatives in there now?

A. None.

Q. Have they had at any time, as far as you know?

A. No.

Q. Does the post master general, or any of his subordinates exercise any authority over the institution?

A. No sir.

Q. Or over any parts of the institution?

A. None.

Q. Or over any of the inmates of your institution?

A. No sir.

Q. Does the post office department in any manner enter upon the precincts or premises of the penitentiary?

111 A. No.

Q. When these letters were written, so far as you know, were they sealed in an envelope in any way?

A. No.

Q. Were they, when they came to you stamped in any manner?

A. No, the letter had never been folded.

Q. This permission to a convict to write a letter does not assure him that the letter will be sent out at all, does it?

A. Not by any means.

Q. If a convict required to know the rules of the prison?

A. He is supposed to know them.

Q. Is it his absolute duty to study and know them?

A. It is.

Q. Isn't a copy of the rules given each and every convict that enters that prison?

A. It is.

Q. And he is admonished to study and become familiar with them?

A. Yes.

Q. Under the rules and regulations governing the prison, can a convict receive a letter that you do not open and read?

A. No.

Q. Do they ever receive letters through the channels of your prison that some one in the penitentiary, some official in the penitentiary does not first examine and open and read?

A. They do not.

Q. You spoke of the letters in the prison being gathered up by orderlies?

A. Trusties—prisoners assigned to certain subdivisions of the prison.

Q. Convicts in the prison?

112 A. Yes.

Redirect examination.

By Mr. O'Donnell:

Q. Those letters that you say you received from Mr. Stroud, you say they were signed by Mr. Stroud and accompanied by an envelope, and unstamped?

A. Yes sir.

Q. And it was your duty to stamp them?

A. Not my duty.

Q. The duty of the officers?

A. It was my duty to advance this letter to the warden, and he made such disposition of it as he thought best.

Q. Did you advise Mr. Stroud that you did not send out those letters.

A. I don't know that I did.

Q. The fact is that you had a system by which a prisoner wrote letters and gave them to the officers of the Government, under the belief that they were being transmitted through the mail—that is correct?

A. I didn't catch it.

(The question was read to the witness.)

Q. You understand the question?

Mr. Robertson: The question is clearly leading and incompetent, coming from the party offering his testimony, and therefore clearly incompetent, as well as combining more than one question together.

The Court: The objection will be overruled.

(To the witness:) Do you understand the question?

113 A. No. The prisoner might believe that letters were being mailed out, but he had no assurance they were. The letter would rest on its own merits in each case; the question of mailing them depends—the question of mailing the letter would depend on the contents of the letter.

Q. Any prisoner writing a letter, to another, in that institution, so far as you know, Mr. Fletcher, necessarily assumed that it would be transmitted through the mail?

A. A prisoner might assume that; I don't know what they would assume.

Q. Who furnished the Stamp?

A. The government.

Q. The government—and that is part of the system by which they induced the prisoner to write a letter and transmit it through the mail.

A. The prisoner was given the privilege of writing, and if the letter was mailable it would be stamped by the penitentiary authorities.

Recross-examination.

By Mr. Robertson:

Q. Did the government ever attempt to induce Robert F. Stroud to write any of those letters?

A. Not to my knowledge.

Q. Does the government, to your knowledge, ever attempt to induce convicts to write letters for any purpose whatever?

A. It does not.

Q. Is it not a fact that before a convict can write a letter, he must first get paper?

A. Yes sir.

Q. And if he has any paper left over, he immediately goes and returns the paper to the office—is that true?

114 A. Yes.

Q. So that, if Mr. Stroud wrote any letter it was of his own volition, was it not?

A. Yes sir.

Q. And he must act pursuant to his permission first obtained?

A. Yes sir.

Q. And he has no assurance that the letter will ever go to the person to whom it is addressed?

A. He does not.

Q. And that is pursuant to the rules of the penitentiary?

A. Yes sir.

Q. What instruction did you issue to the prisoners as to how they were to get their letters in the mail?

A. That instruction is changed from time to time, pursuant to the necessary way they are handled in the cell house—it is changed from time to time.

Q. What instructions were given prisoners in March and April, 1916, as to how they would get their letters in the mail?

A. I could not say at that time.

Q. What instruction was given in April, when you first took charge?

A. I was not thoroughly acquainted with the practice at that time.

Q. When you did become familiar with it what did you find to be the practice?

A. The practice now, the one in vogue for some time, is when the paper is distributed to the prisoners in the various departments, and in this particular department, the isolation ward, a prisoner who wants to write is given a piece of paper inside an envelope, and then he is given the prison rule that he must return

115 the paper he does not use; when the letter is written he is supposed to turn it over to the guard in charge of that department, and the guard, in turn will transmit the letter to the department he is instructed to.

Q. Mr. Fletcher, when a prisoner comes in there some one on

behalf of the institution furnishes him paper and instruction that if he wants to write he may do so?

A. This paper is furnished in each particular case.

Q. And what instruction is he given when he gets the paper to write?

A. If he does not write, he must return it.

Q. State whether or not he is instructed that he may write to anybody he pleases, on this paper that is furnished?

A. No, he is not given that instruction.

Q. Is he advised in some way how he shall get his letter in the mail?

A. He usually writes the letter, and if there is no subject matter that is objectionable to the prison authorities, it will be put in the mail.

Q. You may tell what instruction he is given, or direction, as to how he is to get that letter or have it sent forward—what instruction is given about that?

A. He has that instruction, to turn it over to the officer in charge of that department, or deposit it in the box for that purpose.

Q. What instruction is given to him about how it is to be stamped?

A. He has no instruction about that.

Q. He is instructed, however, if he writes on this stationery and wants to transmit his letter to his relatives, through the mails, he is to write his letter on that stationery, and give it to the officer of the prison, is that correct?

116 A. Yes.

Q. And is he instructed whether he is to furnish a stamp or not?

A. He is given to understand that the government pays the postage.

(Witness excused.)

A. J. RENO, called as a witness on the part of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. O'Donnell:

Q. What is your business?

A. Special agent in charge of the bureau of criminal identification, and also record clerk of the institution.

Q. What was your position before you occupied your present one?

A. Deputy Warden.

Q. You preceded Mr. Fletcher, the gentleman who was just on the stand?

A. Yes sir.

Q. What letters are those you have in your hand, Mr. Reno?

A. Letters written by Stroud.

Q. And, Mr. Reno, what position did you hold when you received those?

A. Deputy Warden.

Q. What facilities did you furnish the prisoners there for communicating with their relatives and friends through the mails?

A. I didn't quite catch that?

(The question was read.)

A. You mean those in isolation?

Q. Yes sir?

117 A. Furnished them writing paper.

Q. And envelopes?

A. Yes.

Q. Did you furnish them stamps?

A. No sir.

Q. What instructions, if any, were given them about the stamps?

A. None whatever.

Q. What instructions did you give Mr. Stroud about those letters?

A. I didn't give him any instructions.

Q. You received those letters from Mr. Stroud for transmission through the mails?

A. Some of them.

Q. In what way was Mr. Stroud informed that a letter written by him on that stationery and accompanied by an envelope, would reach the mail?

A. He was not informed in regard to that.

Q. So far as the prisoner would know, then, this writing was just merely a pastime, was it?

The Court: I think that form of question is calculated to waste time—that is, I should say, I don't think that form of question is calculated to draw an answer of any value from the witness.

Q. How many of those letters did you receive?

A. Let me see just a second; I will look. (Examines documents.)

A. (Continuing:) Two of them.

Q. These other letters that Mr. Robertson showed you just now were also Mr. Stroud's letters?

118 A. Yes sir.

Q. Do you know how Mr. Robertson got those?

A. I presume they were turned over by the Wardens; the letters that went through my hands were turned over to the warden, that is as far as I know anything about them.

(Witness excused.)

THOMAS W. MORGAN, called as a witness on the part of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. O'Donnell:

Q. State your name please?
A. Thomas W. Morgan.
Q. And your business?
A. Warden of the United States Penitentiary, Leavenworth, Kansas.
Q. Have you seen letters Mr. Robertson has in his possession written by Mr. Stroud?
A. I hold some now in my hands, that were handed to me by Mr. Robertson, that presumably are the letters in question.
Q. When did you first see them?
A. I cannot give the exact dates, but probably along from 24 to 36 hours after the dates on the letters.
Q. You may state whether or not you received all of the letters Mr. Robertson handed to you from some of your subordinates at the penitentiary?
A. I must examine them, because I put my initials on all that I received. (Witness looks over documents.) I received all of them.

Mr. O'Donnell: Mr. Robertson, are those all of them?
Mr. Robertson: Those are all the originals of the copies of the exhibits filed with the Government's answer. They don't appear to be the ones you refer to.
119 Mr. O'Donnell: Those, then are all the letters mentioned in the petition or in the answer?
Mr. Robertson: No sir, they are apparently not the letters you refer to in the petition, but they are the ones referred to in the answer. You swear that the ones shown in the answer are not the letters; therefore I assume they are not the ones you want.

Q. Mr. Morgan, will you briefly tell the court how those letters came to you, to your office?
A. They were handed to me, two of them by Mr. Reno, and part of them by Mr. Fletcher, I think—whoever happened to be deputy warden at the time. There was a change of Wardens effective, officially April 1st, but in reality about April 6th, I think.
Q. Mr. Morgan, do you know how they got them?
A. I was not present when they received them, but I understand they were handed them by the guard in isolation.
Q. Those letters were written by Stroud?
A. They were.
Q. And what method did you adopt for having those letters, and all the letters written by Mr. Stroud, transmitted through the mails to those to whom they were addressed?
A. I instructed the deputy wardens, each of the deputy wardens in

turn, to send to my office, to send to me, all letters written by Mr. Stroud.

Q. And those letters at that time were written by Mr. Stroud in accordance with the custom you had adopted, and delivered to those men for transmission through the mails?

A. I may say in answering your question, by way of explanation, that we have two kinds of regulation regulating letters.

Q. That is not the question I asked you; you may
120 state—(to the stenographer) please read the question.

(Question read.)

Q. You can answer, "yes" or "no"?

A. They were, in accordance with the regulations I had adopted for the handling of Mr. Stroud's mail.

Q. That is, they were delivered by Mr. Stroud to the guard for transmission through the mail?

A. For transmission to the deputy warden, and from the deputy warden to me.

Q. But so far as Mr. Stroud was concerned—had Mr. Stroud any other way of reaching the mails, or using the mails?

A. He had not.

Q. You at that time, were accustomed to confiscating those letters written by Mr. Stroud, reaching you in that way?

A. Some of them. At this time, now—you asked me to answer your question—I would like to explain about the different kinds of letters.

Q. As soon as we get to that. Mr. Morgan—did you advise Mr. Stroud you would confiscate the letters written by him?

A. I did not.

Q. And after you had confiscated the first letter written by him, you may state whether you advised him that you would confiscate any others written by him?

A. I don't remember that I did.

Q. You allowed him to rest under the impression that the letters written by him were transmitted to the person to whom they were addressed, through the mails?

A. I cannot give you a general answer to that question; I can do it by telling you what I wanted to tell you a while ago.

121 Mr. Robertson: The question is objected to as cross-examination of his own witness.

The Court: It seems a very direct way of getting at it; I will let him answer.

A. I don't know what impression he rested under.

Q. But you didn't tell him that his letters were not being transmitted through the mails?

A. I did not.

Q. You knew, didn't you, Mr. Morgan, that his idea was that they were being transmitted?

A. I don't know what his idea was; I would assume that he would hope, at least, they were being transmitted.

Q. What was your idea in confiscating them?
A. I thought they might be used in the furnishing of details.
Q. Against Mr. Stroud—you confiscated them to use as evidence against Mr. Stroud?
A. You ask me that question or do you assume it?
Q. I am asking you if that is a fact, Mr. Morgan?
A. Yes sir.

Cross-examination.

By Mr. Robertson:

Q. Did you hear Mr. Stroud testify on the witness stand upon the other trial of this case?
A. I heard part of his testimony. I was so busy getting the witnesses in and out of here that I can not say that I heard it all.
Q. Do you remember of some testimony by him to the effect that he wrote these letters in large measure for the purpose of deceiving the officers of the prison and of the Government as to what his defense would be?
122 (To this question defendant's counsel objected that it had nothing to do with any issue involved in this hearing; and the objection was by the Court sustained.)

Q. Had Mr. Stroud, when he wrote these letters, had he any assurance that these letters would be put in the post office and forwarded to those to whom they were addressed.

Mr. O'Donnell: That is objected to as a conclusion—calling for a conclusion.
The Court: He may answer.

A. He did not.
Q. Did you ever assure Mr. Stroud in any manner that those letters would be put in the mail and go forward to those to whom they were addressed?
A. I did not.
Q. Does the post office department of the United States in any manner enter your prison, or exercise any supervision over the officers in your prison?
A. It does not.

Mr. O'Donnell: That is objected to as a conclusion and not a statement of facts.
The Court: Overruled.

Q. Is there any employe of the post office department of this country engaged in any manner in your prison?
A. There is not.
Q. Or has there been since you have been warden?
A. There has not.
Q. How long have you been warden of the institution?
A. Three years and about eleven months.

(Witness excused.)

123 The foregoing was all the evidence admitted or offered on the hearing upon defendant's petition for rule upon the United States District Attorney, Marshal and Clerk to return letters and papers.

The Court: You submit the matter upon that testimony do you?
Mr. Kimbrell: Yes, your honor.
The Court: Do you care to be heard in argument?
Mr. O'Donnell: We will submit the matter without argument.
The Court: The petition of the prisoner will be denied and an exception allowed.

And to the ruling and action of the Court in denying defendant's petition for a rule upon the district Attorney, Marshal and Clerk to return letters and papers, defendant then and there saved his exception, and still excepts.

The Court: The petition will be overruled.

And to this ruling and action of the Court defendant then and there duly excepted and still excepts.

Mr. O'Donnell: If the Court please, Mr. Andres has filed a petition for a writ of Habeas Corpus ad testificandum; and we would like, if the Court please, to amend that by inserting therein (certain additional names).

The Court: Where are they?
124 Mr. O'Donnell: In the prison.
The Court: You may have the writ: insert the names.

Mr. O'Donnell: We also have a petition for the production of certain witnesses now within the juriediction of the Court: one is a man named James M. Darnell and another named Robert C. Stone.
The Court: Are they here, Mr. Robertson, any of them?
Mr. Robertson: I never heard of them before.
Mr. O'Donnell: One of them, Mr. Darnell, is at Peoria, Illinois, and Mr. Stone is at Belleville, Maryland. Mr. Kimbrell suggests that the important witness is the man at Peoria, Illinois.
The Court: If you had presented that petition before today, I would have given it thorough consideration, and might have granted it, but I don't see how the government can produce at this trial which is now called, the witness desired.
Mr. O'Donnell: We think, if your Honor please, that this witness can get here before we need him.
The Court: How long does it take to come from Peoria?
Mr. O'Donnell: I expect about twelve hours, twelve hours from Chicago to Kansas City, and Peoria is near Chicago.

The Court: You may issue subpœna and have the Marshal
125 in Illinois serve it. I don't know whether that will bring the witness. We will do all we can to have him present.

Mr. O'Donnell: If the Court issues that immediately, we will send it by mail.
The Court: Issue a subpœna, Mr. Clerk, for the witness at Peoria, Illinois.

The Court: Are you ready, Mr. Robertson?
Mr. Robertson: Yes.
The Court: Is the defendant ready?
Mr. O'Donnell: Ready.
The Court: Any gentlemen who have been summoned here as jurors, and who reside in Leavenworth county, will you please stand up? (None stand.)
The Court: There appear to be none from Leavenworth county.
Mr. O'Donnell: The Clerk states that there was one drawn from this County, but he is not in the Court room now. (At this time one juror stands.)
The Court: You live in this County?
Venireman: Yes sir.
The Court: You will be excused from further attendance.

And thereupon the clerk called to the jury box twelve of those summoned as jurors, who were duly sworn to true answers make to all questions put to them touching their qualifications as jurors, and the examination for jurors proceeded as follows:

Mr. Robertson: I think it would be well to have the record show an arraignment.
The Court: I think it is not necessary.
Mr. Robertson: Gentlemen, the charge against the defen-
126 dant in this case is what is known under the laws of the United States, as a charge of murder in the first degree. That charge, under the law, includes other charges such as murder in the second degree and manslaughter. It is charged in the indictment that this defendant—(after a brief interruption:) The charge, gentlemen, as I started to say, is that this man, Robert F. Stroud upon the 26th day of March, 1916, killed this man mentioned in the indictment, Andrew F. Turner, by stabbing him with a knife or dagger in the dining room of the Federal penitentiary near this city. The charge is, gentlemen, that this is a murder under such circumstances as to constitute murder in the first degree, a deliberately planned, coldly executed, malicious murder. The penalty, the extreme penalty under the laws of the United States, might be death. If you were called upon to serve as jurors, if you should, upon the whole case, find the defendant guilty of first degree murder, you would have the power, if you felt the facts justified it, to recommend life imprisonment instead of capital punishment. That could be done by adding to your verdict the words, "without capital punishment." I mention these things to you on account of the questions that I will want to ask you, to ascertain whether you should sit as jurors in the case or not. If you will kindly
stand, the first gentleman over here, and give the Court your
127 name.
The Venireman (rising): H. A. Shearer.

H. A. SHEARER, having been duly sworn, testified as follows:

Questions by Mr. Robertson:

Q. Will you spell your name for the stenographer?
A. H. A. S-h-e-a-r-e-r.
Q. Where do you live, Mr. Shearer?
A. Close to Frankfort, Kansas.
Q. What is your business?
A. Farmer.
Q. Have you heard of this case, previous to the statement here in the court room?
A. I think I have read a very little about it.
Q. Has enough come to you by reading or otherwise, so that you now have an opinion as to the guilt or innocence of the defendant?
A. No, sir.
Q. You have no opinion?
A. No, sir.
Q. Do you happen to be acquainted with the defendant?
A. No, sir.
Q. Do you know any of his lawyers?
A. No, sir.
Q. Have you a feeling *or* prejudice against the administration of capital punishment, provided the circumstances and facts would justify it?
A. No, sir.
Q. You think you have no feeling of prejudice against it?
A. No, sir.
Q. Now you understand from what I have said that the court will advise you upon the trial, in first degree murder cases, a jury may add the words "without capital punishment" and that would mean life imprisonment instead of the possible sentence by the Court of death. Would you, if you were chosen as a juror go into the
128 case with the distinct preference for either form of verdict before you heard what was in the case?
A. No, sir.
Q. You think you would be perfectly free in that?
A. Yes, sir.
Q. Mr. Shearer, do you know any reason why you would not make a fair juror between the defendant and the government?
A. No, sir.
Q. Do you know of any reason?
A. No, sir.
Q. If the defense should be here in this case, or one of the defenses should be a claim that the defendant is insane or of unsound mind, if that defense was brought up, do you think you could still be just as a juror, and deal as justly between the parties as you could if it was not mentioned or brought forward?
A. Yes, sir.
Q. What I am getting at there, is whether you would feel that you had any preference that—if you feel a sort of feeling of prefer-

ence or favoritism toward a defense of that kind in a murder case, before you heard the case at all? Have you got any preconceived ideas, is what I am getting at?

A. I don't know as I understand you.

Q. What I mean by that: have you a feeling that because one man kills another, he must be crazy?

A. No, sir.

Q. You have no such feeling?

A. No, sir.

Mr. Robertson: We pass the juror from cause.

Questions by Mr. Kimbrell:

Q. What county is Frankfort in?

A. Marshall county.

Q. You live in Marshall county?

A. Yes, sir.

Q. How far is that from Leavenworth?

A. I think it is some over one hundred miles.

The Court: The government may examine all of them.

129 Mr. Robertson: They are just following the practice here; that is the way it is usually done.

The Court: Is that your practice?

Mr. Robertson: Yes, sir.

The Court: Very well. Defendant's counsel examine.

Q. Mr. Shearer, the defense of this man, Stroud, is that he killed Turner because Turner was trying to inflict bodily harm upon him. Stroud is a convict. Turner was a guard in authority over him. Would the fact that Stroud is a convict and that the man killed was a man in authority over him, prejudice you against the convict so that you would not consider the evidence tending to show self-defense, in his favor, just as you would if he were not a convict? In short, would the fact that he is a convict prejudice you in considering the evidence showing that he killed in self-defense?

A. Well, I think it would, slightly.

Q. Why?

A. Well, I would consider when a convict—that he would not have as good standing as a private citizen. There must be cause for him being a convict.

Q. Do you feel that a convict would not or should not have the right to resist a guard killing him, or trying to kill him?

A. Yes, he has.

Q. But would the fact that he is a convict prejudice you in considering his right of self-defense—do you mean that?

A. No.

Q. That is not it: would you give to the evidence in his favor, if there was any, tending to show self-defense, the same fair consideration that you would if he were not a convict?

A. Yes, sir.

Mr. Kimbrell: That is all.
Mr. Robertson: The next juror.

130 CHESTER MOORE, having been duly sworn, testified as follows as to his qualifications as a juror:

Questions by Mr. Robertson:

Q. What is your name?
A. Chester Moore.
Q. Where do you live, Mr. Moore?
A. Mayetta, Jackson county.
Q. How far do you live from Leavenworth?
A. Let us see—I could not say just how far—Jefferson county is between the two counties; I think probably seventy-five miles. I don't know just exactly.
Q. Have you heard the purported facts in this case?
A. No, sir; I have not.
Q. Have you read about the case?
A. Very little.
Q. Very little?
A. Yes, sir.
Q. Have you had enough information about it so that you now have an opinion as to the guilt or innocence of the defendant?
A. No, sir.
Q. You have not?
A. No, sir.
Q. What is your business?
A. I run a tavern in Mayetta and also farm some.
Q. You heard the questions and the answers of Mr. Shearer who preceded you?
A. Yes, sir.
Q. Who was just examined?
A. Yes, sir.
Q. Now, has anything occurred to you from that to make you think you could not make a fair juror between the government and defendant here?
A. Just I don't believe I would be in favor of capital punishment.
Q. Do you say you have conscientious scruples against it?
A. Yes, I think I have.
Q. You think if the facts and the law, when combined, warranted the punishment, you think you could not vote for a verdict that would authorize the court to pronounce that sentence?
131 A. Well, I don't know what I might do, but I never have felt in favor of it.
Q. What I want to get now—we are expecting now to get down to this question, whether you say to the court now that you feel that you have such a feeling of opposition to capital punishment that you

could not sit here as a fair juror, as between the government and the defendant?

A. Well, I consider that I really don't believe I could.

Mr. Robertson: I expect Mr. Moore is hardly a qualified juror.

The Court: Defendant's counsel may inquire.

Questions by Mr. Kimbrell:

Q. Do you mean merely that you are opposed to capital punishment as a policy?

A. I don't understand what you mean by "policy."

Q. You don't believe in it as a rule of law—is that what you mean?

A. No, sir, I don't.

Q. But regardless of your belief as to what the law ought to be, have you such conscientious scruples against the infliction of the death penalty that you would not concur in such a verdict—a verdict of that kind—no matter *no matter* what the evidence might be, is that what you mean?

A, Well, I don't really understand myself just how I do mean it.

Q. If you have any conscientious scruples that would prohibit your concurring in the verdict that carried the death penalty, you are not conscious of it; you don't understand yourself that you have any such scruples on that question?

A. I don't know hardly how I do feel about it. I never felt that the death penalty, a good many times, was severe enough.

132 Q. Yes sir—now the defense in this case is self-defense: this man was an inmate of the federal prison—he was a convict, and he killed a man in authority over him, he claims because the man was trying to inflict bodily harm upon him with his club. Would the fact that the man that he killed was in authority over him prejudice you against his right of showing self-defense?

A. I don't know that it would, no sir.

Q. Well, don't you know that it would not? Wouldn't you consider evidence showing that a convict struck to save his own life in the same favorable way that you would if he were not a convict?

A. Well, he is under authority, isn't he?

Q. Yes, but do you feel that that gives the man in authority over him the right to take his club and beat him or mistreat him, or do you feel that in such a case he would have the right to strike in his own defense?

A. Probably there was a way of getting out without killing him.

Q. May have been, yes sir—but the plain question is, would the fact that he was a convict protecting himself from a man who was inflicting bodily harm against him, would that prejudice you against his right of self defense?

A. Well, I don't know that it would—no sir.

The Court: Is this juror accepted on both sides?

Mr. Robertson: I think not; I don't think Mr. Moore would make a fair juror under the statement that he gives. Perhaps I should say

to you further, Mr. Moore, that the position of the government will be in this case that the verdict ought to be the extreme penalty. Now, it might be that the facts and the instructions that you get from the court would not justify it at all, and on the other hand it
133 might be that they would justify it. Now, are you perfectly free to follow those facts and those instructions in either direction to the ultimate conclusion?

A. Well, of course, I think as a man I would follow the instructions—I would have to.

(By Mr. Robertson:)

Q. Let me ask you this: is it your opinion this morning that the man that is guilty of a plain, malicious cold blooded inexcusable murder, is it your opinion that under no circumstances his life ought to be taken for that offense?

—. Well, I should think that he could get more punishment other ways.

Q. Then, if I understand you, if you are a juror here, you would not, under any circumstances vote for the verdict that meant the extreme penalty?

A. I would rather not.

Mr. Robertson: Mr. Moore surely could not be fair to the government, in the state of mind he is in. I challenge him for that reason.

The Court: Any further questions?

Mr. O'Donnell: No further questions.

The Court (to Mr. Moore): You will be excused.

Mr. O'Donnell: We except to the ruling of the Court. If the Court please, we would like at this time to present some authorities.

The Court: I do not care to hear them. Mr. Clerk, call another juror.

And to this ruling and action of the Court defendant then and there duly excepted and still excepts.

WILLIAM MCCONNELL, called as a juror, being duly sworn, testified as follows as to his qualifications as a juror:

134 Questions by Mr. Robertson:

Q. What is your name?

A. William McConnell. They have it McCormell, I believe, but it is McConnell.

Q. Where do you live, Mr. McConnell?

A. Denison, Jackson county.

Q. Are you in any manner acquainted with the purported facts in this case?

A. I think not.

Q. Have you read anything about it?

A. Some—yes.

Q. Have you gathered enough information from all sources so that

you now have an opinion as to the guilt or innocence of the defendant?

A. No sir.

Q. You have not?

A. No sir.

Q. What is your business?

A. I make a business of invoicing stocks of merchandise and conducting special sales.

Q. You are a merchant, then?

A. Why, no.

Q. A salesman?

A. Yes sir.

Q. Do you travel about over the country a good deal in your business?

A. Quite a little.

Q. Do you entertain a feeling of opposition to the administration of capital punishment?

A. No I think not.

Q. You think if the facts—do you feel that if the facts in the case, as weighed by the instructions that the court gives you, justify it, you could vote for the verdict that meant the extreme penalty?

A. Yes, I believe so.

Q. And if the facts and the law justified it, would you do it, if you were a juror?

A. Yes, if the facts and the law justified it, I would.

Q. The facts would have to show this, that it was malicious, cold blooded, plain murder without any just excuse?

A. Yes sir.

Q. Now then, if that situation arises, and the facts and the law, as given you by the court, seem to justify or did justify your action, and you felt that they did, would you be willing to act in that way, would you—that is so?

135 A. Yes sir.

Q. If your conscience was satisfied that you should act in that way, you have not any preconceived notions about the law that would prevent your doing it—that is what I understand?

A. No sir.

Q. Now, have you been a juror in court before, Mr. McConnell?

A. In any court? Yes sir.

Q. Have you in the Federal Court?

A. No sir.

Q. You have in the State court—District State Court?

A. I have in the State Court, yes.

Q. Have you been a juror upon criminal cases?

A. Well, I hardly know—I believe so, yes sir.

Q. You understand, I take it, that cases are tried and decided solely on what you get here in the court room?

A. Yes sir.

Q. Now, do you know any of the attorneys for the defendant here?

A. No, only by sight.

Q. Do you know Mr. O'Keefe?

A. I know him by sight.
Q. Mr. Andres?
A. No sir.
Q. Mr. Kimbrell?
A. I know Mr. Kimbrell by sight.
Q. Mr. O'Donnell?
A. No sir.
Q. You don't know the defendant?
A. No sir.
Q. Now, you heard the previous questions and answers that were asked of the other gentlemen—did you not?
A. Not particularly, no sir.
Q. You heard the examination of Mr. Shearer at your left there?
A. No, I could not hear all of it.
Q. What you did hear, is there anything in that caused you to feel that you could not make a fair juror here?
A. You questioned something about insanity—I don't know but I would rather be questioned on that a little.
Q. About the only question I could ask you about that is this: If it should be claime dthat the defendant was insane—I under-
136 stand now that it is not going to be——

Mr. Kimbrell: I don't understand so.

Q. —it has been heretofore; well, if it should be, would you go into the trial with the theory that a man must be crazy to kill another one?
A. No sir.
Q. Do you entertain a notion that a man that is mentally responsible for his acts cannot plan a murder—do you feel that way?
A. That he could not plan a a murder?
Q. Yes, and carry it out?
A. No.
Q. Now, let me see if I understand you; you are of the opinion, I take it, if I understand you right, that a man is not mentally unbalanced, just because he kills somebody?
A. That is the position I take, yes sir.
Q. That is the position you have got?
A. Yes sir.
Q. Is that a fixed opinion you have in your mind?
A. Well, if I understand you—I don't——
Q. Maybe we don't understand each other?
A. I don't think that a man necessarily has to be insane to plan a murder, and on the other side, I don't know whether I could be fair or take fair consideration of any testimony that was that a man committed a crime of that kind and then pleads insanity—I would not give that much consideration—that is the way I feel about it.
Q. Well, the thing we want to get at is whether you have a fixed prejudice about that sort of defense that would keep you from obeying the testimony and the law you get here in the court room?
A. No sir.
Q. You could dismiss any opinion that you may have got, and try

it on the facts and the law, as you get them here in the court room, can you?

A. I think so.

Q. You would do that, if you were a juror?

A. I think so, yes sir.

137 Mr. Robertson: I think we will pass Mr. McConnell.

Questions by Mr. O'Donnell:

Q. Mr. McConnell, I didn't get your occupation?

A. Salesman—I make special sales.

Q. Where do you live?

A. Denison, Jackson County.

Q. Are you a married man, Mr. McConnell?

A. Yes sir.

Q. Now, Mr. McConnell, in cases of this character, in this court, the court will instruct you, and it is the law, that no matter what the evidence may be with reference to the crime charged, that you have an absolute right, for any reason that seems good to you, to write into your verdict the words, "without capital punishment," even if you were to find that the defendant was guilty of murder in the first degree, and no matter under what circumstances it was committed, if committed, now if you had your choice—if you have a choice as to what you would write into your verdict, you may state whether or not you have: would you favor one of those punishments more than the other?

A. Do I favor one more than the other?

Q. Yes?

A. No sir.

Q. Do you favor the death penalty for first degree murder, rather than life imprisonment?

A. Owing to the circumstances and the testimony.

Q. You have read, you say, about this killing?

A. Just read of it.

Q. Do you have an opinion about the killing?

A. None whatever, no sir.

Q. Do you have any opinion whether the defendant is guilyt or innocent?

A. No. sir.

Q. Are you acquainted with Mr. Robertson, the gentleman who just addressed you?

A. No sir.

138 A. *No, sir.*

Q. Or with Mr. Morgan, who is warden of the United States penitentiary?

A. No, sir.

Q. Have you ever visited that institution?

A. Yes.

Q. When, Mr. McConnell?

A. Well, if I understand, there is one, the United States prison out

here, I visited with two other men when I was down here about a month ago.

Q. You visited it when you were down here about a month ago—who was it you talked with up there, who did you talk with while you were up there, Mr. McConnell ?

A. Nobody, only the party that was with me, that I know of.

Q. Who let you in?

A. We went through the gates with a party of eight or nine of us, I believe—I don't know just how many.

Q. Who were the men that were with you, if you recall?

A. Mr. Moore and another juror, three of us started. Then there was a party of seven or eight ladies went.

Q. Did you talk with anybody up there about the defendant Stroud?

A. No, sir.

Q. Did anybody mention anything about that?

A. No, sir.

Q. As I understand you then, you have no prejudice in favor of capital punishment?

A. No, sir.

Q. And you have no prejudice in favor of life imprisonment?

A. No, sir.

Q. Did you go through the isolation ward up there at the penitentiary, when you were out there?

A. I think not.

Q. Did anybody point out to you where the defendant Stroud was incarcerated?

A. No, sir.

Q. Did you make any inquiries about him, Mr. McConnell?

A. None whatever, no, sir.

Q. Who was it suggested that you go out there Mr. McConnell?

139 A. Well, I had a desire—In fact I didn't know that the defendant was in that prison—in fact I never thought anything about it. I was down here and had a little time, and wanted to make a little visit, and the men talked about going out to the fort, and finally we went out to the United States prison—that is about how we happened to go out.

Q. Just because it was an interesting place and you had never been there before?

A. Never had been there before.

Q. Mr. McConnell, have you ever been a public official of any kind?

A. No, sir, only city clerk out there.

Q. City clerk in your little town—Mr. McConnell, you would give a convict's defense of self-defense the same consideration, his right to protect himself from injury, that you would anybody else?

A. Why, I think so.

Q. That is to say, the defendant Stroud, being a convict up here in that institution where you were, and a guard in authority over him

sought to assault him with a club or did assault him, you would give him the same right to defend himself that you would to any man on the street, if he was attacked, and if he was threatened with injury of that kind?

A. I hardly know.

Q. You don't know whether you could or not, Mr. McConnell?

A. I might be able, if I knew the circumstances.

Q. Well, suppose the court instructs you that he had the same right to defend his person as anybody else from threatened death or injury, you would follow the instructions of the court, and give to his defense the same consideration that you would to that of anybody else?

A. Yes, sir.

Mr. O'Donnell: That is all.

Mr. Robertson: Pass Mr. McConnell. The next gentleman.

140 W. F. DIXON, called as a juror, having been duly sworn, testified as follows touching his qualifications as such juror:

Questions by Mr. Robertson:

Q. What is your name?

A. W. F. Dixon.

Q. Where do you live?

A. Junction City, Geary county.

Q. What is your business?

A. Merchant—hardware merchant.

Q. How far is your place of residence from Leavenworth?

A. About 130 or 135 miles.

Q. 130 to 135 miles?

A. About that distance, yes, sir.

Q. Have you heard anything about this case, other than what has occurred here in the court room?

A. No.

Q. I will ask you then if you have any opinion as to the guilt or innocence of the defendant?

A. I have not, no, sir.

Q. Have you any feeling of prejudice against capital punishment?

A. No, sir, I have not.

Q. You are willing to vote that kind of verdict if the facts and the law justify it?

A. Yes, sir.

Q. Are you a married man?

A. Yes, sir.

Q. Have a wife and children?

A. Yes, sir.

Q. How long have you lived in Kansas?

A. All my life.

Q. Born in Kansas?

A. Yes, sir.

Q. Are you acquainted with any of the attorneys you see in this case?

A. Only just by seeing them.

Q. I take it you don't know the defendant?

A. No, sir.

Q. Have any questions been asked any of the others here that cause you to feel that you would not make a fair juror in this case?

A. No, sir, I don't know of any.

Q. Do you know of any reason at all why you should not sit on this case?

A. I don't know of any.

Q. Have you ever been a juror in the Federal Court before?

A. No, sir. (Answer not distinctly audible.)

141 Mr. Robertson: That is all.

Questions by Mr. Kimbrell:

Q. Have you ever served as sheriff or in connection with any police department?

A. No, sir.

Q. Or held any office in connection with the administration of justice?

A. No, sir.

Q. What has been your business?

A. I have been a farmer up until 15 years ago.

Q. And then what?

A. I am now a hardware and implement dealer.

Q. In a case of conviction of first degree murder, under the act of congress, the jury may find one of two verdicts, even if they find that the defendant committed deliberate, premeditated murder: that submits him to just one of two penalties—that is, they may just find him guilty of murder in the first degree, in which case it becomes the duty of the court to sentence to hanging, or they may write into their verdict the words, "without capital punishment" in which case it is the duty of the court to make the punishment imprisonment for life. Now, there are two choices for jurors. Do you favor the death penalty as against life imprisonment for first degree murder?

A. No, I can't say that I have a choice until I know the circumstances.

Q. It would depend on the circumstances?

A. Yes, sir.

Q. The defense in this case is simply this: that the man who was killed was a guard in the Federal prison here; this defendant was a prisoner there, and had been for some years; he was twenty-two or twenty-three years old at that time; that the guard was trying to inflict bodily harm upon him unnecessarily just after he had addressed a civil request to him; that he tried to struggle with the club,
142 or hold it to prevent the guard from harming him, and found that he could not, stabbed him. Would the fact that he is a prisoner, a convict, and that the man he killed was in author-

ity over him prejudice you in considering the evidence showing his right of self-defense?

A. No, sir, not a bit.

Q. You believe that a convict being assaulted unjustifiably, would have the same right to defend himself just the same as any other man?

A. I would consider that he had the right, just the same as I would consider the right of any other man.

Q. Would you let the fact that the man that he killed was in authority over him prejudice you in considering the question?

A. No, sir.

Q. Have you ever visited the prison?

A. No, sir.

Q. Do you know Mr. Morgan or any of the officials there?

A. No, sir, I don't.

Q. Did you ever talk with a man who was a witness or claimed to be a witness about the facts?

A. No, sir.

Mr. Kimbrell: That is all.

FRANK JOHNSON, called as a juror, having been duly sworn, testified touching his qualifications as a juror, as follows:

Questions by Mr. Robertson:

Q. What is your name?

A. Frank Johnson.

Q. Where do you live, Mr. Johnson?

A. Olathe, Johnson county.

Q. What is your business?

A. Merchant, shoes.

Q. How long have you lived in Johnson county?

A. Eight years.

Q. Where did you reside before?

A. Harper county, near Newton.

Q. How far is Olathe, the place of your residence, from Leavenworth?

A. Forty miles.

143 Q. Have you heard anything about this case before coming here to the court?

A. Just heard of it.

Q. Have you heard enough about the case so that you now have an opinion as to the guilt or innocence of the defendant?

A. No sir.

Q. Are you acquainted with any of the attorneys that you now see interested in the case?

A. No sir.

Q. Do you know the warden of the prison, Mr. Morgan?

A. No sir.

Q. You have no opinion as to the guilt or innocence of the defendant, at all?
A. No sir.
Q. Do you know of any reason at all why you should not sit here as a juror?
A. I do not.
Q. Have you any prejudice, any feeling of opposition against the administration of capital punishment?
A. Not when justified, I have not.
Q. We are assuming that in the question?
A. I have not.
Q. You understand, I take it, the privilege you would have if you were a juror here, of adding the words, "without capital punishment" to your verdict; do you feel, if you were a juror, you would want to avail yourself of the chance of adding them, no matter what the evidence was?
A. No.
Q. You feel, do you not, free to do the right thing, whatever the right thing was?
A. Yes sir.

Mr. Robertson: That is all.

Questions by Mr. Kimbrell:

Q. You are aware, I suppose, that there is a division of sentiment as to the proper penalty for first degree murder, that is deliberate and premeditated?

Mr. Robertson: There is no division of sentiment so far as
144 the Federal law is concerned.
The Court: I think the inquiry is not objectionable.

Q. (continued.) Some people favor capital punishment in all cases of first degree murder, some are opposed to it—what view do you take?
A. It would depend some on the nature of the case.
Q. But are you an advocate of the capital punishment theory rather than imprisonment for life?
A. No sir.
Q. I take it you mean that it would depend upon the circumstances of the killing?
A. Yes sir.
Q. In some cases of first degree murder you might favor the death penalty, in others life imprisonment—is that what you mean?
A. Yes sir.
Q. You know, under the law of Kansas, there is no capital punishment—do you oppose that as a legal policy?
A. No.
Q. You are in accord with it so far as the state of Kansas is concerned?
A. Yes sir.
Q. Now, under the Federal law, in case of the jury concurring that

the killing was deliberate, premeditated with malice aforethought, they would have the choice of two penalties, one of these would mean death by hanging and the other imprisonment for life—would you favor one rather than the other—is your prejudice inclined to one rather than the other?

A. It is not, no sir.

Q. We think the testimony will show that the man that was killed was a guard armed with a club, and attempting at the time that he was stabbed and killed to inflict bodily harm upon the defendant after the defendant had requested that he be not reported for some small offense against the prison rules, that the guard immediately made an attempt to harm him, and that he killed him in self-
145 defense: He is a convict and the man he killed a man in authority over him. Would you let the fact that he is a convict prejudice you in considering the evidence tending to show his right of self-defense?

A. No sir.

Q. You would give a convict's evidence, or evidence in favor of that convict the same weight that you would in favor of an outsider?

A. Yes sir.

Q. Did you ever hold a position connected with the administration of justice?

A. No.

Q. Have you ever been sheriff?

A. No sir.

Q. Do you know the gentleman representing the government, Mr. Robertson?

A. No sir.

Q. Mr. Morgan?

A. No sir.

Q. Have you ever visited the prison out here?

A. I never have.

Q. Have you talked about this case to anybody that claimed to have been a witness or know anything about the facts?

A. No sir.

Mr. Kimbrell: That is all.

Mr. J. S. NORMAN was then called as a juror and excused by the court, without objection on either side, on account of duties at home connected with a war saving committee of his county.

JOHN A. BASGALL, called as a juror, having been duly sworn, testified as follows touching his qualifications as a juror in this cause:

Questions by Mr. Robertson:

Q. What is your name?

A. John A. Basgall.

146 Q. Where do you live, Mr. Basgall?

A. In Ellis county.

Q. How far is that from Leavenworth?

A. Two hundred and eighty some miles.
Q. Have you heard anything about this case more than what has happened here in the court room?
A. I think I read about it.
Q. Have you obtained enough information about it so that you now have an opinion as to the guilt or innocence of the defendant?
A. From what I have read, yes sir.
Q. You have now a fixed opinion?
A. Yes sir.
Q. Are you in that mental state that you could not disregard that opinion?
A. I don't know that I could.
Q. Couldn't you disregard that and take the facts and the law as you got it here in the court room and try it?
A. Yes sir.
Q. You could do that now?
A. Yes sir.
Q. Did you talk with anyone who claimed to be a witness in the case?
A. No sir.
Q. How did you get the information?
A. I said, just by the papers.
Q. Just the papers only?
A. Yes sir.
Q. You feel that you could disregard all that information and any opinion that you had, and make a fair juror here, do you?
A. Yes sir.
Q. Have you a feeling of prejudice against capital punishment in murder cases?
A. Yes sir.
Q. You are against capital punishment?
A. Yes sir.
Q. Are you against it to the extent that you would not vote for it at all under any circumstances?
A. I don't know about that.

147 Q. Do you belong to any organization that the principles—one of the principles of which is opposition to capital punishment?

A. No sir.
Q. Does this feeling of opposition grow out of an opinion of your own that you have formed by yourself?
A. Yes sir.
Q. And is that a fixed opinion in your mind?
A. Yes, I would prefer the life imprisonment, to the capital punishment.
Q. And you prefer it to the extent that you would vote for it if you had the opportunity under any circumstances, that you would vote for it before you would for capital punishment?
A. Yes sir.
Q. You would do that under any circumstances where you had an opportunity?

A. Yes sir.

Mr. Robertson: I am afraid we will have to challenge Mr. Basgall.
The Court: The defendant may inquire.

Questions by Mr. Kimbrell:

Q. You don't believe in capital punishment as a policy, is that what you mean?
A. Yes sir.
Q. You prefer in a case of first degree murder fixing the death penalty rather than death by hanging.
A. No, I prefer life imprisonment.
Q. Life imprisonment, I meant?
A. Yes sir.
Q. You understand, do you, in any case of first degree murder, if the jury find the defendant guilty, that they may choose between the penalties: if they bring in a verdict saying that the defendant is guilty of murder in the first degree, that the court will sentence the man to death by hanging, if they add the words, "without capital punishment" then the jury recommend and the court will fix the penalty at life imprisonment—you understand that?
A. Yes.
148 Q. Now, do you mean that under any circumstances you would not concur in a verdict of murder in the first degree where it meant death by hanging?
A. I mean I would prefer the life imprisonment.
Q. Yes sir, everybody has a preference, but it is not a question of preference, have you such conscientious scruples against the death penalty that you would not concur in a verdict with the others?
A. I don't know, sir.
Q. You are not aware of any such convictions as that are you?
A. I don't know about that.
Q. I will continue my inquiry—

The Court: I am not sure that I thoroughly understand the juror.

(By the Court:)

Q. If you are held as a juror in this case, the law in effect permits the jury, if they find the defendant guilty of murder in the first degree, to fix his punishment either at death or life imprisonment: would you, regardless of what the facts might be, refuse to find a verdict that would be followed by sentence of death against the defendant, under those conditions?
A. When there would not be a chance for life imprisonment.

(By the Court:)

Q. There would be a choice of life imprisonment or death?
A. Yes sir.

(By the Court:)

Q. You would refuse to vote for the verdict that meant death?
A. Yes.

The Court: Stand aside.

Mr. O'Donnell: We except to the ruling of the court excusing the juror, for the reason that, under the Federal statute, he is a qualified juror.

149 And to this ruling and action of the Court defendant then and there duly excepted and still excepts.

WILLIAM LEICHLITER was then excused from further service, by the Court, without objection by either side, on the ground that his wheat crop required his immediate attention.

F. L. SHIELDS, called as a juror, having been duly sworn, testified as follows touching his qualifications as a juror in this case:

Questions by Mr. Robertson:

Q. What is your name, please?
A. F. L. Shields.
Q. Where do you live?
A. Cheyenne county, Kansas.
Q. How far is that from here, Mr. Shields?
A. 403 miles, according to the United States Marshall.
Q. Have you heard anything about the purported facts in this case?
A. I have read of it in the papers.
Q. Have you received any information about it, so that you now have an opinion as to the guilt or innocence of the defendant?
A. Yes, I formed an opinion from just what I read in the papers.
Q. Is that an opinion it would take evidence to remove?
A. It would be removed very easily because it is not a fixed opinion—it was just from the papers.
Q. Are you in that frame of mind that you could take this case and try it according to the evidence that you heard in the court room, and the law as the court gives it to you?
A. I could.
Q. You could do that without any reference to the opinion you had previously had?
A. After hearing the evidence, I think so.

Q. If you are a juror, could you approach this case free
150 from these statements you have heard before, and try it on what you hear in the court room?

A. I could.
Q. Will you do it if you are a juror,
A. I will do it.
Q. Have you a feeling of prejudice against capital punishment in cases of this kind?
A. I have not.

Q. Do you know of any reason at all, why you could not sit here as a juror in this case?

A. No, I don't know as I do—I don't know of any reason.

Q. You feel you are in position to do exact justice between the government and this man?

A. I do.

Questions by Mr. Andres:

Q. Mr. Shearer, you say you live in Cheyenne county?

A. Yes sir.

Q. What is your business?

A. Banking business there.

Q. How long have you been in the banking business?

A. Fifteen years.

Q. Are you a married man?

A. Yes sir.

Q. Have you been on a jury before?

(Answer indistinct.)

Q. Were you ever a member of the legislature?

A. I was.

Q. What year?

A. 1907.

Q. You met Mr. Robertson when he was a member there, did you?

A. Yes sir.

Q. You are a very good friend of Mr. Robertson?

A. Very good friends.

Q. You counseled with him very frequently when you were in the legislature with him?

A. I did.

Q. Were on the same committees together?

A. No, Mr. Robertson was in the senate, and I was in the house.

Q. Did you look after his matters while in the house, any bills that the senator introduced, did you look after them?

A. We had one bill in together that the senator introduced
151 in the senate and I looked after in the house.

Q. You and he are very good friends, are you not?

A. Well, we are pretty good friends.

Q. How long have you had this opinion in this case?

A. Well, I will tell you: I read about this case two or three years ago, or whenever it was, then I had forgotten it until I came here again, then that kind of refreshed my recollection of what I had read before.

Q. And the newspaper articles you read a month ago, didn't change your opinion that you had prior to that time, did it?

A. I had really forgotten what I had in mind about this case.

Q. Then when you read about it again, what you had forgotten all came back to your mind and you had the same opinion that you had before you refreshed your recollection?

A. Yes, when I read it again, it did; but it had been so long since I had read it that I had forgotten entirely about the case.

Q. Have you, in addition to reading about the case, conversed with witnesses or anybody?

A. I have heard talk and I heard statements in the court room.

Q. At the time this case was continued, is I believe what you have reference to?

A. Yes.

Q. That also didn't change your opinion of it, did it?

A. No sir.

Q. What you have heard, as a matter of fact, had a tendency to more than ever impress upon your mind that the opinion you had formed was about as correct as it could be, didn't it?

A. It didn't weaken it a bit—my understanding is the same thing yet.

Q. Now Mr. Shields, taking into consideration the regard you have for Mr. Robertson, he having been with you down to the legislature, you having had an opinion in the case that extended
152 over a period of practically a year, and having heard the statements in the court room here that didn't weaken that opinion, do you feel that you are a competent juror to sit in this case and give the defendant a fair and impartial trial? Would you, in other words, want a man of your present feeling and your past feeling, to sit on the trial of your case, you being where Robert Stroud is and the other juror being where you are now?

A. No sir, I woule not want him.

Mr. Andres: I challenge the juror for cause.

The Court: We can not let the juror decide his competency. The last answer is not of very serious moment.

Mr. Andres: I didn't hear your Honor's statement.

The Court: The last answer is not of serious moment, neither is the fact that he was somewhat intimately acquainted with Mr. Robertson in the legislature of any consequence. If he has a fixed opinion about the merits of this case, which would require evidence to remove, I would like to know that.

(Mr. Andres, continuing:)

Q. You have just stated that you don't feel, knowing your own mind as you do, that you would want a juror to try you if you were on trial for murder, who felt as you do—you so answered that question, did you?

A. I did.

Q. Then I take it from your answer, Mr. Shields, that you have a fixed opinion about the guilt or innocence of this defendant that would take evidence to remove?

A. Let me explain: of course I know that sufficient evi-
153 dence would change my mind, that I would decide this case on the evidence and not on the opinion I have formed; but the defendant does not know how I feel, the prisoner could not

know that, and for that reason, if I was the defendant in this case I certainly would not want a person feeling like I do. However, I feel sure I would decide the case according to the evidence.

Q. You know how you feel, don't you?

A. Yes, sir.

Q. And you have said that there could be evidence to remove that feeling introduced here?

A. There could.

Q. So that the net result of what you are driving at, is that you have a fixed opinion that it would take evidence to remove?

A. Yes, sir, it would take evidence to remove it.

Q. And the evidence might not remove it?

A. That is according to which way the evidence went. The evidence might be in accordance with the opinion.

Q. So that it might or might not remove the opinion?

A. Well, I guess the answer would be "yes" to that.

The Court: You may stand aside. Call another juror, Mr. Clerk.

E. F. McCloskey, called as a juror, having been duly sworn, testified as follows touching his qualifications as a juror to sit in this case:

Questions by Mr. Robertson:

Q. What is your name, please?

A. E. F. McCloskey.

Q. Mr. McCloskey, where do you live?

A. Osage City, Osage county, Kansas.

Q. About how far is your place from Leavenworth?

A. The government says ninety-four miles.

Q. Ninety-four?

A. Yes, sir.

Q. Have you heard anything about this case more than what has occurred in this court room?

154 A. Only what I have heard since I have been here.

Q. Have you heard anything so that you have an opinion as to the guilt or innocence of the defendant?

A. No, sir.

Q. What is your business?

A. Insurance.

Q. Are you a married man?

A. Yes, sir.

Q. How long have you lived in Kansas?

A. About fifteen years.

Q. Where from originally?

A. Philadelphia.

Q. What business were you in in Philadelphia?

A. A hotel.

Q. Have you a feeling of prejudice against the administration of capital punishment?

A. No, sir.
Q. You heard my statement of what this case is about, did you not?
A. Yes.
Q. Are you acquainted with any of the counsel you see interested in the case?
A. I don't know any of them.
Q. Do you know the defendant?
A. Only by sight since I have been here.
Q. Have you been a juror before?
A. Never have.
Q. Do you know of any reason at all why you could not sit on this case?
A. No, sir.

Questions by Mr. Andres:

Q. Mr. McCloskey, what did you say your business is?
A. Insurance.
Q. How long have you lived down in Osage City?
A. About twelve years.
Q. Were you ever a member of the Kansas legislature?
A. I never have been.
Q. Have you ever been justice of the peace?
A. I have been.
Q. Where were you justice?
A. Osage City.
Q. Are you justice of the peace now?
A. I am not active.
Q. But you were elected and didn't qualify—is that it?
155 A. I have always qualified, but I am not acting at this time.
Q. You are engaged principally in the insurance business out there?
A. Yes, sir.
Q. Do you travel around the state a great deal?
A. No, sir.
Q. Are you just a local or general agent?
A No, sir, I am general manager of the company.
Q. You know Mr. Robertson quite well?
A. I don't know him at all.
Q. Did you ever talk about this case to anyone?
A. No, sir.
Q. Anybody ever talk to you?
A. No, sir.
Q. Do you know anything whatever about the case?
A. Nothing at all only what I have learned here.
Q. From what you have learned here in the court room, have you formed or expressed an opinion as to the guilt or innocence of the defendant?

A. No, sir.

Q. Now, if you sit in the jury box would you listen to the evidence and decide it the same as you would any other case you had never heard anything about?

A. I think so.

Q. Now, Mr. McCloskey, do you believe, the mere fact a man is charged with a crime there must be some justification for the arrest and trial?

A. Must be a probable cause for it.

Q. Does that have a tendency to prejudice you against the person on trial?

A. No, certainly not.

Q. Does the fact that this man has been arrested and is now on trial here cause you to go into the trial with the feeling that there was some justification of the action of the government here?

A. Nothing more than that there was probable cause.

Q. What do you mean by "probable cause"?

A. That there was a crime committed by somebody and
156 that it is probable that the defendant committed it.

Q. Would that carry with it the conviction that he is guilty?

A. Absolutely not.

Q. Now, the fact that he is a convict, would that in any wise prejudice his in your estimation?

A. Prejudice him?

Q. Yes?

A. Or prejudice me?

Q. Prejudice you against him——

A. I think not.

Q. Would you give his testimony the same fair consideration that you would any other witness?

A. I think so.

Q. You think so? Have you any doubt about that?

A. Not any more than such as might be set up by the fact that he has already committed a crime or is convicted of a crime.

Q. And that would militate against him in your estimation, that he has already committed a crime?

A. Well, I don't know, as it stands, I could not say; at this time; I would be governed entirely by the evidence.

Q. Absolutely—are you in favor of capital punishment?

A. I think that is a matter for the court.

Q. Well, the court will finally assess the punishment fixed by law, but——

A. I have no objection to it.

Q. The court will finally pass it up to you if he is convicted of murder in the first degree, whether or not that will carry capital punishment?

A. That would not enter into my judgment in case of the guilt or innocence of the defendant.

Q. Do you advocate capital punishment in the case of first degree murder?

A. That has been very often inflicted, I know.

Q. Do you advocate it?

A. If that is the punishment to be inflicted, I would advocate it.

Q. Now, in case there is a choice between life imprisonment and capital punishment, would you favor capital punishment in
157 case the jury return a verdict of murder in the first degree?

A. I would be guided entirely by the evidence.

Q. Would you insert in your verdict, assuming that you convict him of murder in the first degree, with capital punishment,—in other words do you lean more strongly in favor of the death penalty for first degree murder, than you do to life imprisonment?

A. I don't think I have any leaning one way or the other—I have no preference.

Q. You have absolutely no preference?

A. I think that is entirely a matter for the court.

Q. Have you a choice whether a man would be condemned to death or life imprisonment, depending on your verdict, or have you absolutely no choice?

A. If the punishment fitted the crime, I have not, no, sir.

Q. Do you know Mr. Robertson personally?

A. No, sir.

Q. Do you know either of the attorneys in the case?

A. I don't know any of them.

Q. You are a married man, Mr. McCloskey?

A. Yes, sir.

Q. Do you have occasion to transact any insurance business with public officials?

A. None whatever.

Q. Or government officials?

A. None whatever.

Q. Do you know the warden of the Federal penitentiary, Mr. Morgan?

A. No.

Q. Have you any relative who is a guard?

A. No, sir.

Q. Or any kind of a prison official?

A. No, sir.

Q. Have you any relatives in Kansas holding government position?

A. No, sir.

Q. Have you any relative in any other state building holding a government position?

A. No, sir.

Q. Are you at the present time a candidate for appointment to any government position?

A. No sir.

158 Q. Are you at this time seeking any business with any department of the Federal government?

A. No sir.

Mr. Robertson: One more question.

(By Mr. Robertson:)

Q. What is the name of your insurance company?
A. Majestic Fire Insurance Company.

There being no further questions, the juror was passed for cause.

J. F. MOHERMAN, called as a juror, having been duly sworn, testified as follows touching his qualifications to sit as a juror in this case:

Questions by Mr. Robertson:

Q. Where do you live?
A. Kansas City, Kansas.
Q. What is your business?
A. Feed merchant.
Q. Where do you live in Kansas City, Kansas?
A. Kansas City, Kansas—800 Ohio avenue, is my address.
Q. That is your residence address?
A. Yes sir.
Q. What is the business address?
A. 275 North 7th street.
Q. Have you heard anything about this case?
A. Oh, nothing only what I read about it at the time it happened, that is all.
Q. Have you any opinion as to the guilt or innocence of this defendant?
A. No sir.
Q. You have not?
A. No.
Q. Did you ever talk about the case to anybody, in Kansas City, Kansas?
A. No sir.
Q. Do you know Mr. Prouty, a banker there?
A. I know him by sight.
Q. Do you know Mr. Thompson, the abstractor?
A. I know him by sight too. I have had no business with him lately.
Q. You have had no business with them of late?
A. No sir.

159 Q. Have you a feeling of opposition against the administration of capital punishment?

(Answer indistinct.)

Q. Have you any feeling of prejudice against inflicting the death penalty in murder cases?
A. I would be governed according to the evidence. It would have to be pretty strong for me to be in favor of the death penalty, if I did.

Q. Well, Mr. Moherman, under the law, the death penalty can not be administered unless the proof shows deliberate, cold blooded murder without any justifiable excuse—the law contemplates that to start with. Now, then, do you have a feeling that capital punishment ought not to be administered even in that kind of a case, where he takes another's life, plans to do it, takes it deliberately without any legal justification for it?

A. Well, of course, I have not decided that; I would have to have the evidence in order to say; at the same time it would take pretty strong evidence to change my mind.

Q. You mean that your mind is now that you would not be in favor of capital punishment in any case, I take it then?

A. Yes sir.

Q. That is the way you feel about it?

A. Yes sir.

Q. And if you were sitting on the jury here in this case, and you found, no matter what the evidence was, that you could do as you pleased between life imprisonment and the death penalty, you would say now that you would not be for the death penalty, under any circumstances, if you could vote for the life imprisonment?

A. I believe I would.

Q. You would what?

A. Vote for life imprisonment.

Q. You would vote for life imprisonment?

A. Yes sir.

Mr. Robertson: We challenge this man.

The Court (to defendant's counsel): You may inquire.

160 Mr. O'Donnell: I believe we have no questions.

The Court: Stand aside.

And to the action and ruling of the court in excusing the juror, the defendant's counsel then and there duly excepted upon the ground that he is a qualified juror under the law of Kansas and of the United States.

BEN. TALBOT, called as a juror, having been duly sworn, testified as follows, touching his qualifications to sit as a juror in this case:

Questions by Mr. Robertson:

Q. What is your name?

A. Ben Talbot.

Q. Where do you live, Mr. Talbot?

A. Lyon county.

Q. How far from Leavenworth?

A. 134 miles, I believe it is.

Q. Have you heard the purported facts in the case?

A. No, I have heard the statements in the court room, that is all.

Q. Have you heard anything so that you now have an opinion as to the guilt or innocence of the defendant?

A. I think not.

Q. Are you acquainted with the defendant or any of his attorneys?
A. No sir.
Q. Do you have a feeling of opposition generally to the administration of capital punishment?
A. No sir.
Q. You think you are perfectly free on that question?
A. Yes sir.
Q. Do you feel that you could go into this case and take the facts and the law, as the court gave it to you here, and deal out exact justice, under that statement?
A. Yes sir.
Q. As well as in every other condition?
A. Yes sir.
Q. Are you a married man, Mr. Talbot?
A. No sir.
161 Q. Have you been?
A. No sir.
Q. You are a batchelor?
A. Yes sir.
Q. What is your business?
A. Farmer.
Q. You live in what part of Lyon County?
A. The western part.
Q. What is your post office?
A. Plymouth.
Q. And are you acquainted with any of the other gentlemen you see here as jurors?
A. No sir, never met any of them until I came here.
Q. None of your friends here, your neighbors?
A. No sir.
Q. Have you sat on a Federal jury before?
A. No sir.
Q. You have in your county the State court?
A. Yes sir.
Q. You understand that cases are to be decided according to what you get in the court room?
A. Yes sir.

Mr. Robertson: That is all.

Questions by Mr. O'Donnell:

Q. Have you got any prejudice against finding a recommendation for life imprisonment in a first degree murder case?
A. No, I don't think I have.
Q. That is, no matter what the evidence may be, you have an absolute right in a first degree murder case, to write into your verdict "without capital punishment," that is your absolute right and your responsibility; now have you got any prejudice against the provision of the law that authorizes life imprisonment in a first degree murder case?

A. No, I don't think so.

Q. And you also stated, as I understand you, that you have no prejudice against the provision of the law that authorizes the jury to put a man to death in first degree murder?

A. No.

Q. I take it, however, Mr. Talbot—is it your idea that you would just as soon hang a man as not, if you had an opportunity,

162 Mr. Talbot?

A. That would depend somewhat on the evidence.

Q. How long since you served as a juror?

A. It has been quite a while.

Q. Have you within the last year?

A. No sir.

Q. What year was that?

A. 1907.

Q. Are you a married man?

A. No sir.

Q. Are you acquainted with Mr. Robertson?

A. No sir.

Q. Or with Mr. Harvey, his assistant?

A. No sir.

Q. With Mr. Morgan?

A. No sir.

Q. Or with any official in the penitentiary?

A. No sir.

Q. Would you give the defendant the same consideration in considering any defense that he would advance, that you would give any other citizen—would you consider his defense on this charge just as you would consider the defense of anybody else?

A. Well, sir——

The Court: I don't hear it.

A. To be frank about it, it would be harder—it would be a little harder for me than it would in some other cases.

Q. That is, the fact that the man was a convict, that the guard was killed by a convict would prejudice you against the convict?

A. No, I don't know that it would.

Q. In other words, you don't think that because a man is a convict that it annuls his humanity, when he is attacked, he has a right to defend himself?

A. No, I have no idea like that.

Q. I don't understand just what you mean?

A. Well, the fellow has been accused of crime, or convicted; I think it would be a little harder for me to give his evidence the same consideration as I would a man who had been leading an upright life and had never been convicted.

Q. It would prejudice you some?

A. It would some—yes.

163 Q. That is, in the weighing of the evidence put in on the side of the defense, you would consider the fact that he was

a convict, on trial for that offense? You would not give his evidence as much credit as you would that of a man in the street?

A. I think it would be a little harder for me.

Q. Do you apply that to the evidence of the defendant himself or to the evidence of other witnesses who testified on his side of the case?

A. I apply it to the witness himself, the defendant.

Q. Now would the fact that the defendant is in the prison and some guards came on the stand and testified against him, would the fact that he is a prisoner charged with crime upon the guard prejudice you against the defendant in favor of the testimony of those guards?

A. No, I don't think so.

Mr. O'Donnell: That is all.

Mr. Robertson: One question, I want to ask you.

Q. Mr. Talbot, let us just assume now for the purposes of the answer that the defendant here does not testify at all, he has a right to do that, remain off——

Mr. O'Donnell: We object to the remark of the prosecutor.

Mr. Robertson: Just wait until I get through, and you will not object to it.

Q. Assuming that condition now to exist, would you then have a prejudice against his case just because he is a convict?

A. Not at all.

The Court: He has not said that he would be prejudiced against his case. He has only said that he would consider it in weighing the evidence of the defendant.

Mr. Robertson: The answer came up in such a way that he included the defendant's case and testimony.

164 The Court: Yes, but he denied that he would be prejudiced against the testimony of other witnesses.

Mr. Robertson: I am glad it is clear in your Honor's mind.

The Court: I think it is very clear.

GALEN GUARD, called as a juror, having been duly sworn, testified as follows as to his qualifications as a juror to sit in this case:

(Mr. Guard here made a statement relative to his personal business, and asked the court to excuse him from service on the ground that his individual business required his immediate attention.)

The Court: We will take it up this afternoon. Now, you men on the back row have qualified as jurors, and may be accepted as such. You other six gentlemen have not been examined. It is highly important that none of these gentlemen called here as jurors talk to anyone about this case. It is highly important that you do not listen to talk by others about this case. If such conversation is taken up in your presence, it would be your duty to withdraw, so that you could not hear what was being said; and if there be those

who persist in talking in your presence about this case, you should report them to the court, because in that event they would be guilty of contempt, and will be punished. It is perhaps of more importance that you six gentlemen who have qualified do not talk
165 to anybody about this case than it is of these other jurors, because counsel have examined you and accepted you as qualified jurors, and if you should become disqualified at recess, they have no means of finding it out.

Now, all of you are held as jurors in the case, whether you now be in the box or in the body of the court room, and are required, if finally selected, to try this case on the law and the evidence that you hear in your presence at the trial, and if you do not render a verdict based solely on that you hear in the case as the testimony and the law given you by the court, you have not discharged your duty as jurors, and have not done justice between the United States and the defendant; so that I want to give you this caution just as impressively as I possibly can that it is your duty not to talk about the case before you are selected as jurors and not to talk about it after you are selected as jurors, in order that your minds may be free from any influences which would induce you to reach a verdict, except the evidence alone in the case. Now, you owe that, as good citizens in the administration of justice, both to the government and to the defendant, and besides that, you owe it to your own good reputation and standing, that your conduct as jurors be such that no man can have his suspicions that you violated your duty
166 as jurors, after you were summoned as such in this case.

These instructions I hope will be sufficient not only for this recess, but for all others. When we return at two o'clock, you gentlemen in the box take the same seats you have now. We will take a recess until two o'clock.

The court here took a recess until two o'clock in the afternoon of the same day, at which time the trial of this cause was resumed, and the following proceedings were had:

Mr. CHALON GUARD, recalled, testified as follows, touching his qualifications as a juror to sit in this case:

Questions by Mr. Robertson:

Q. Where do you live, Mr. Guard?
A. Beloit, Kansas, Mitchell county.
Q. What is your business?
A. Farmer.
Q. Yes, you spoke before lunch, about your condition out there. Had you heard anything about this case before you came here?
A. Oh, I might have read something about it when it happened.
Q. How long have you lived in Mitchell county?
A. 35 years.
Q. Have you any opinion now as to the guilt or innocence of this defendant?

A. No sir.

Q. Have you a feeling of opposition and prejudice against capital punishment?

A. No, I have not.

Q. I think I observed some hesitation on your part there; possibly you did not; but if the case is one where the facts justify a verdict of that sort and the law coincides with the facts to such an extent that it seems to justify that sort of a verdict, would you hesitate at all in voting for it?

167 A. No sir.

Q. Do you know of any reason at all why you would not make a fair juror here between the government and this defendant?

A. Not in that way, I would not, no sir.

Q. Is there anything in your mind that causes you to feel you might not make a good juror in the case?

A. No sir.

Q. Do you know any of the parties you see here interested in the case as attorneys or otherwise?

A. No sir.

Q. Do you know that you are acquainted with anybody represented to be a witness in the case?

A. No sir, not to my knowledge.

Q. Have you been a juror before?

A. Yes sir, a number of times.

Q. Do you belong to any organization of any sort, the principles of which are opposed to capital punishment in murder cases?

A. No sir.

Q. Do you now think of any reason at all why you could not do exact justice in this matter if you are retained?

A. No sir, I do not.

The Court: What is the name?

The Juror: Guard.

Questions by Mr. Andres:

Q. Mr. Guard, you say that you have never formed or expressed an opinion in regard to the guilt or innocence of the defendant?

A. I believe not.

Q. Did you ever have an opinion on the subject?

A. No sir.

Q. You merely read what you did read as a matter of news and then dismissed it from your mind?

A. Yes sir.

Q. Now, in your deliberations, after you have thought this matter over in the jury room, and assuming that you convict the defendant of murder in the first degree, you would have a choice

168 as to whether you would inflict the death penalty or recommend life imprisonment—do you have any convictions that would induce you to lean toward the death penalty as against life imprisonment?

A. I believe I have, yes sir.
Q. That is, you lean more strongly toward the death penalty than you do toward life imprisonment?
A. Yes sir.
Q. You would not consider the proposition to recommend life imprisonment, if you believe beyond a reasonable doubt that he was guilty of murder in the first degree?
A. I don't think I would, no sir.
Q. You would just simply stand right on that, and say when you convicted him of murder in the first degree, you want and insist upon the death penalty being inflicted?
A. Yes sir, I would.

Mr. Andres: If your Honor please, the defendant challenges the juror, for cause.
The Court: Overruled.

And to this ruling and action of the court defendant then and there duly excepted and still excepts.

(By Mr. Andres, continuing:)

Q. Mr. Guard, would you have a prejudice against the defendant Stroud because he happens to be a convict now?
A. Yes sir, that is the reason I have.
Q. And you could not give him the same kind of a trial that you would if he didn't happen to be in the penitentiary?
A. I don't believe I could, no sir, not under the circumstances.
Q. You don't feel now, after knowing practically what you do about his present surroundings, that you would be a competent and fair juror for the defendant, in this case?
A. I don't feel that way, no sir.
Q. When you were here about a month ago, or about the
169 23rd of May, in this court room—you were, were you not?
A. Yes sir.
Q. And you were a juror?
A. Yes sir.
Q. Did you hear anything about this case then, except in the court room here?
A. No sir.
Q. You heard something in the court room?
A. Yes sir.
Q. You heard what the lawyers said and what the judge said—what the lawyers for the defendant and what the lawyers for the government said?
A. Yes sir.
Q. Did the things that you heard said at that time prejudice you against the defendant in this case?
A. Not a bit.
Q. Do you remember what you heard—you don't need to tell what it is?

A. No sir, I don't—not in particular—just the nature of it is all.

Q. Just the nature of the case?

A. Yes sir.

Q. So you say if the testimony in this case would show that Robert Stroud the defendant is at the present time confined in the United States penitentiary undergoing punishment, that that would prejudice you in the consideration of the testimony in this case?

A. Some, yes sir.

Q. And it would militate or weigh against the defendant in his defense?

A. Yes sir.

Mr. Andres: We renew our challenge to exclude the juror, for cause, if the court please.

The Court: Has the prosecution any other questions?

Questions by Mr. Robertson:

Q. I am not really sure whether you understand the point that counsel is making or not: Mr. Guard, do you feel that the mere fact that the defendant is a convict up there, that that fact
170 puts you in such a frame of mind that you could not try this case on the evidence offered here in the court room?

A. No, I don't mean that.

Q. Are you in a frame of mind that you could not do that, on the evidence that you get here in the court room, and not charge him with the fact that he is a convict in the penitentiary?

A. No sir.

Q. You agree that a convict, if he were assaulted, would have the same right to defend himself that you would have, if he were unjustly and unreasonably assaulted? A. Yes, that would be true.

Q. In other words, he is entitled to all the rights accorded in the court room, the same as you or anybody else?

A. Yes sir.

Q. Would you give him those rights? A. Yes sir.

The Court: What did you mean when you answered before?

A. I mean that a man that is under restrictions of the law, the requirements might be a little more strict, rather than a free man—that is what I meant. While I don't say that he has no right to defend himself, or anything like that,—he would have just as good a right in court as anybody else, but under the circumstances as I have heard here, I would believe that a man who was under the restrictions of the law would be a little more bound than a free man—that is the reason I said that.

(By the Court:)

Q. After you have heard all the testimony in this case, if the court would instrict you that the defendant, notwithstanding the fact that at the time of the commission of the offense charged against him he was then a convict held in punishment in the penitentiary,

yet he was entitled to the same rights and the same defenses
171 as if he were a free man, would you give him the benefit of those rights?

A. I believe so, yes sir.

(By the Court:)

Q. Is there any doubt in your mind about it?

A. There has been some, yes sir. It would take evidence to remove it. I have always been of the opinion that a man under the restrictions of an officer has not got the same liberty as a man that is not. He may have a right to defend himself but I have always held that prejudice against him.

Q. You think it might take some testimony to remove that—is that the feeling you now have on the subject?

A. I believe it would.

The Court: You may be excused.

W. G. SCHMIDT, called as a juror, having been duly sworn, testified as follows touching his qualifications to sit as a juror in this case:

Questions by Mr. Robertson:

Q. What is your name?

A. W. G. Schmidt.

Q. Where do you live, Mr. Schmidt?

A. Junction City, Kansas.

Q. What is your business?

A. Farmer.

Q. How long have you lived out in Junction City?

A. Since 1880.

Q. How far is that from Leavenworth?

A. In a direct line about 125 miles—about 140 on the railroad by Kansas City.

Q. Have you heard the purported facts in this case?

A. I have just heard the circumstances as I read them in the papers is all.

Q. Have you acquired enough knowledge of it so that you now have an opinion as to the guilt or innocence of the defendant?

A. I have not.

Q. Are you acquainted with anyone that you see inter-
172 ested in the case as attorneys or otherwise?

A. I am not.

Q. Did you hear my statement this morning as to what this case was about?

A. I could not hear very well. I sat in the back part of the room. I can't hear very well, in fact.

Q. The charge is that the defendant on the 26th day of March, 1916, killed Andrew F. Turner a guard in the Federal penitentiary here at Leavenworth, Kansas, and in killing that man committed a

premeditated, cold blooded, malicious murder, as it is charged in the indictment, that he planned this murder in advance and killed this man; and the extreme penalty in that sort of a case, that might be inflicted by the court, might be death. A juror in determining his verdict in the case, might, if he found the defendant guilty of first degree murder, qualify his verdict by adding the words, "without capital punishment"; that would mean life imprisonment. You see, if you should be a juror, and if you find the man guilty of first degree murder, you could bring in either verdict, that is either death by hanging or life imprisonment. That is the law of the United States—the law of the country. Now, under that state of affairs, do you feel that you are prejudiced against capital punishment, the taking of a human life?

A. I am.

Q. And do you have that feeling of opposition to that extent that would prevent you from voting for a verdict that would mean death for the defendant?

A. It would.

Q. You would vote against it under any circumstances?

A. Yes, sir.

The Court: You will be excused.

Mr. O'Donnell: To the action of the court in excusing juror Smith, defendant excepts, for the reason that the juror is qualified
173 under the laws of Kansas and under the Federal law.

And to this action and ruling of the court, defendant still excepts.

The Court: Call another juror.

CARL LOWERY, called as a juror, having been duly sworn, testified as follows touching his qualifications as a juror to sit in this case:

Questions by Mr. Robertson:

Q. What is your name?

—. Carl Lowery.

Q. Where do you live, Mr. Lowery?

A. Smith Center, Kansas,—Smith county.

Q. How far, about, from this city, where this trial is now on?

A. 251 miles.

Q. 251?

A. Yes, sir.

Q. What is your business?

A. Furniture business.

Q. How long have you lived in Smith county?

A. 30 years.

Q. Did you hear my statement of what this case is about?

A. Yes, sir.

Q. Have you heard anything more about the facts in this case than what you heard in the court room?

A. No, sir.

Q. Have you an opinion now as to the guilt or innocence of this defendant?

A. No, sir.

Q. Are you opposed to capital punishment to that extent that it would affect your verdict in this case?

A. No, sir.

Q. Do you think if you are chosen as a juror in this case you could do exact justice between the government and the defendant here—do you?

A. I do.

Q. Do you know of any reason at all why you should not sit as a juror in this case?

A. No, sir, I do not.

Q. Do you happen to know anyone you see interested in the
174 case?

A. No, sir.

Q. I suppose you have never heard of the defendant, until you heard of this case?

A. No, sir, I never did.

Questions by Mr. Andres:

Q. Mr. Lowery, you are in the furniture business at Smith Center?

A. Yes, sir.

Q. Been there how many years?

A. At Smith Center, 18 years.

Q. Have you any relative that is in the employ of the government at the present time?

A. No, sir, not that I know of.

Q. Have you any relative that is holding any public position at the present time?

A. None.

Q. Have you ever held any public position?

A. No, nothing only a city office, that is all.

Q. What is the character of your office?

A. Oh, I am one of the councilmen of our city.

Q. You never were a deputy sheriff or constable or justice of the peace?

A. No, sir.

Q. Were you ever a police officer?

A. Yes, sir, I was police of our town, four years.

Q. Was that the only time you ever served as a police officer?

A. Yes.

Q. Now, Mr. Lowery, assuming that the testimony in this case would show that Robert F. Stroud the defendant is in the Federal penitentiary here undergoing punishment, and was at the time of the alleged commission of this act, would the fact that he was and is still a convict prejudice him in your estimation?

A. No, sir, it would not.

Q. You would give him and his defense and his witnesses that

same fair consideration that you would the witnesses of the
175 defendant in any other case?

A. I would, yes, sir.

Q. You believe that a man undergoing punishment, then, has the same rights as a citizen, and that he is within the pale of the law, and has a right to defend himself against attack, do you?

A. I do.

Q. Did you ever sit as a juror in a criminal case before?

A. No, sir, I never did.

Q. Now, you say you have no opposition whatever to the infliction of the death penalty; if you had a choice between the infliction of the death penalty and the recommendation of life imprisonment, Mr. Lowery, would you prefer the infliction of the death penalty?

A. No, I don't think I would. I would weigh the facts in the case.

Q. You would weigh the facts and try to arrive at a just, as well as a merciful conclusion, in the case?

A. Yes, that is the way I feel about it.

Q. You would not deliberately by your vote cause a human being to be hanged simply because you had the power to do it, would you?

A. No, sir, I would not.

Q. Can you recollect of any cases, while you were a police officer, Mr. Lowery, of having been attacked by one under arrest?

A. Oh, I don't know as I do, anything that amounted to anything—no.

Q. Now, when you finally took them to jail and they talked back to you—something like that— did you ever go to assault them in any way?

A. No, sir, I never did.

Q. Did you ever have any connection with any case, growing out of an assault upon you or any other police officer, sheriff or arresting officer?

A. No, I never did.

Q. Did you have any complaints lodged against you with your chief of police or the council because of ill treatment by you of men under you or within your custody?

176 A. No, sir, I never did.

Q. Are you a married man?

A. Yes, sir.

Q. Have you any boys?

A. I have two boys.

Q. How old are they?

A. One is 29 and the other is 23.

Q. Is your mother living, Mr. Lowery?

A. No, sir, my mother is dead.

Q. Is your wife living?

A. Yes, sir.

Q. Now, do you see any attorneys connected with the trial of this case with whom you are personally acquainted?

A. I don't; I am not personally acquainted with any of them.

Q. If you are chosen as a juror in this case, you will try it, Mr.

Lowery, according to what you hear in this court room, and in accordance with the instructions of the court, will you?

A. I certainly would have to do it.

Q. I asked you this question, Mr. Lowery, if you have any preference as between the infliction of the death penalty and the recommendation of life imprisonment and you said you had no preference so far as the infliction of the death penalty was concerned: I will ask you this question, have you any prejudice against sending a man to the penitentiary for life?

A. No, sir, I have not.

Q. In first degree murder cases?

A. No, sir.

Q. In your own mind, do you concur in the law of Kansas which says that if a person is adjudged guilty of murder in the first degree, the penalty shall be life imprisonment in the Kansas penitentiary—do you believe in that?

Mr. Robertson: We object to that as immaterial.

The Court: I presume, as a citizen of Kansas, he is in sympathy with the law. That is not the law here.

Mr. Andres: The idea is to get at the juror's idea upon the subject.

177 The Court: You can do that——

Mr. O'Donnell: If the Court please, Section 275 of the Penal Code says that in the qualification and examination of jurors, the state law shall govern in the Federal Court: and this juror living in the state of Kansas and qualified to try an indictment of murder in the first degree, it would not be necessary for him to believe in capital punishment.

The Court: That is a far-fetched argument; we will eliminate that phase of it. Proceed Mr. Andres.

And to this ruling and action of the court defendant then and there duly excepted and still excepts.

Q. Mr. Lowery, you know of no reason why at this time you could not try this case fairly and impartially and render a verdict according to the law and the evidence as given in the court room here?

A. No, I do not know of any.

Q. You never talked with anybody that pretended to know anything about it?

A. No sir.

Q. You never sought information from anybody that pretends to know anything about it?

A. No sir, never.

Q. You read newspaper articles as mere matter of news and dismissed it from your mind?

A. Yes sir.

Q. And your mind is open to conviction as to the guilt or innocence of the defendant?

A. Yes sir.

Mr. Andres: That is all.

W. J. KINSLEY, called as a juror, having been duly sworn, testified as follows as to his qualifications as a juror to sit in this case:

178 Questions by Mr. Robertson:

Q. Where do you live, Mr. Kinsley?
A. Marshall county, near Marysville.
Q. How long have you lived at Marysville?
A. 37 years.
Q. How far is that from this city?
A. 136 miles.
Q. Have you heard of this case, more than what has come to you in the court room here?
A. I never did.
Q. Do you have or entertain an opinion as to the guilt or innocence of the defendant?
A. I do not.
Q. What is your business?
A. Farmer.
Q. Are you a married man?
A. Yes sir.
Q. A farm owner, Mr. Kinsley?
A. Yes sir.
Q. How far do you live from the city of Marysville?
A. Five miles.
Q. Which way?
A. Northeast.
Q. Have you any feeling of prejudice against capital punishment, in murder cases?
A. I have not.
Q. So far as this question is concerned, do you feel you are perfectly free to do what the circumstances justify here?
A. Yes sir.
Q. And that you have no prejudice of any sort in the way of exercising your free option on these forms of verdict?
A. Yes sir.
Q. You feel that you are perfectly free on that?
A. Yes sir.
Q. You will act, then, I take it, without any preconceived ideas on that?
A. Yes sir.
Q. Just taking the law and the evidence, and do your plain duty as you see it?
A. Yes sir I would.
Q. And that would be your ambition, would it?
A. Yes sir.

Q. Do you know of any reason why you should not be
179 chosen as a juror here?
A. I do not.

Q. You heard these examinations of these other gentlemen?
A. Yes sir.

Q. Has anything suggested itself to you as we have questioned them to make you think you could not be a fair man?
A. No sir.

Questions by Mr. Andres:

Q. I didn't get your name?
A. W. J. Knusley.
Q. Where do you live, Mr. Knusley?
A. I live in Marshall county, near Marysville.
Q. You are a farmer?
A. Yes sir.
Q. How long have you lived out there?
A. 37 years.
Q. Are you a married man?
A. Yes sir.
Q. Your wife living?
A. Yes sir.
Q. Have you any boys?
A. Two boys.
Q. How old are they?
A. 17 and 20.
Q. Mr. Kinsley, assuming that you should be a juror in this case, finally accepted by both sides, and the jury had agreed to convict the defendant and it became a choice between the infliction of the death penalty and a recommendation of life imprisonment, have you any preference as between those two punishments?
A. I have not, no sir.
Q. You have no choice whatever?
A. No sir; none whatever.
Q. Have you ever held any public office?
A. Nothing only minor office—I am township trustee at the present time.
Q. Have you ever been a deputy sheriff, constable or town marshal?
A. No sir.
Q. Or did you ever act as an arresting officer?
A. I never did.
Q. Or as a guard?
A. No sir, never did.
Q. Are you seeking any office at the present time at the hands of the government or government officials?
A. No sir, none whatever.
180 Q. Have you any relatives who are in the employ of the government at this time?
A. Not that I am aware of, no sir.
Q. Did you ever have any dealings with the government officials in any way?
A. No sir, never did.
Q. Now, you read about this case?
A. Slightly.

Q. Heard it talked about when you were here a month ago?
A. Yes sir.
Q. You were in the court room when the lawyers were talking, and his honor was talking about us?
A. Yes sir.
Q. Do you remember what you heard at that time?
A. No sir, I could not recall.
Q. What you heard at that time made no impression upon your mind as to the guilt or innocence of the defendant?
A. None whatever, no sir.
Q. Did you ever sit as a juror in a murder trial before?
A. No sir.
Q. Mr. Kinsley, the defendant, as has been said, is charged with murder in the first degree, and it is his claim that he acted in self-defense. At the time of this assault and killing Mr. Turner, the deceased, was a guard and in authority over Stroud, the defendant. Now, would the fact that Stroud is a convict and was one then and subject to the orders of Mr. Turner, would the fact that he was in the penitentiary undergoing punishment at that time and is there now, prejudice him in your mind in any way whatever?
A. No sir, it would not.
Q. Would you give his testimony and the testimony of his witnesses the same fair consideration as a juror, that you would the testimony of any other defendant who was not indicted or was not incarcerated at the time of the commission of the act or at the time of the trial?
A. I would.

181 Mr. Andres: Pass the juror.

JOSEPH OBERDING, called as a juror, having been duly sworn, testified touching his qualifications to sit in this case, as follows:

Questions by Mr. Robertson:

Q. Where do you live?
A. Seneca, Kansas.
Q. Nemaha county?
A. Yes sir.
Q. How long have you lived there?
A. About thirty-eight years.
Q. How far is that from Leavenworth?
A. Right close to one hundred miles.
Q. Have you heard anything about this case, more than what you have heard in the court room?
A. Yes sir.
Q. Have you heard enough so that you have an opinion as to the guilt or innocence of the defendant?
A. Yes sir.
Q. You do have—is that a fixed opinion that would take evidence to remove from your mind?
A. Yes sir, it would.

Q. You would have to hear testimony, you think—you think it is that sort of opinion that would affect your verdict, if you were chosen as a juror?
A. I feel that it would.
Q. You swear that you are disqualified as a juror in this case?
A. I think so.
Q. Are you in that position that you could not go on and try it on the law and the evidence?
A. Hardly.
Q. Could not do it——
A. I have read a good deal about the former trials.
Q. What newspapers did you read it in?
A. The Star, I think.
Q. The Kansas City Star?
A. Yes sir.
Q. Do you take any of the Leavenworth newspapers?
A. No—not at the time.

182 Mr. Robertson: I fear the juror is disqualified.
The Court: Does the defendant join in the challenge?
Mr. Kimbrell: Yes.
The Court: Stand aside.

C. I. McGregor, called as a juror, having been duly sworn, testified as follows touching his qualifications as a juror to sit in this case:

Questions by Mr. Robertson:

Q. What is your name?
A. C. I. McGregor.
Q. Where do you live, Mr. McGregor?
A. Osage county, Olivet.
Q. Osage City?
A. Olivet.
Q. Olivet?
A. Yes.
Q. What is your business?
A. Merchant.
Q. How long have you lived there?
A. 30 years.
Q. Have you in any manner been made acquainted with the facts in this case?
A. No sir.
Q. Have you any opinion now as to the guilt or innocence of the defendant on trial?
A. No sir.
Q. Do you have any feeling of opposition to capital punishment?
A. No sir.
Q. Are you free on that question, if you should be chosen as a juror here?
A. Yes sir.

Q. You have heard the examinations of the other gentlemen here have you?
A. Yes sir.
Q. You have heard my statements on what the case was about?
A. Yes sir.
Q. Are you acquainted with Mr. McCloskey, who lives I believe over in your county?
A. Yes sir.
Q. Are you and he personally friendly to each other?
A. Yes sir.
183 Q. Do you know any of the other gentlemen you know to be drawn on the jury here?
A. No sir.
Q. Do you know of any reason now, why you should not sit in this case?
A. No sir.
Q. Are you a married man?
A. Yes.
Q. I take it you are a property owner over there?
A. Yes sir.
Q. What family have you?
A. A wife and one boy.
Q. How old is the boy?
A. Three years old.

Mr. Robertson: That is all.

Questions by Mr. Andres:

Q. Mr. McGregor, under the law, the United States law, it is within the province of the jury in a case such as we are trying here now, to make a recommendation as to whether they will inflict the death penalty or recommend life imprisonment in the Federal penitentiary. If you are chosen as a juror, you may have to make a choice between the two. I want to ask you if you have any choice between those two?
A. No sir, I would not say as I have.
Q. You would, as Mr. McCloskey said, try to make the punishment fit the crime?
A. Yes sir.
Q. And you have no choice between those two at all?
A. No sir.
Q. Now, the defendant in this case was a convict in the Federal penitentiary at the time of this alleged killing of guard Turner, and he is there now. Have you any prejudice against him simply because he is a convict?
A. No sir.
Q. Would you give his testimony and that of his witnesses the same fair consideration that you would any other witnesses?
A. I would.
Q. You would not permit that to count against him, at all?
A. No sir.

184 Q. Would not argue it in the jury room? And you would try this case on the facts of the case, regardless of what he had done before?

A. Yes sir, I would.

Q. Do you know why he was there?

A. No sir.

Q. Did you ever hear?

A. No sir.

Q. If you find out why he was in there would you take that into consideration in arriving at your verdict as a juror?

A. No sir.

Mr. Robertson: That is a pretty broad question; it would depend entirely upon the circumstances. It is an improper question.

Q. You don't know of any reason why you could not try this case fairly and impartially?

A. No sir.

Q. Do you know Mr. Robertson?

A. No.

Q. Or Mr. Harvey?

A. No.

Q. Or anybody connected with this trial in this case?

A. No sir.

Q. Have you ever been justice of the peace?

A. No sir.

Q. Or Town Marshall?

A. No sir.

Q. Constable or deputy sheriff?

A. No sir.

Q. Ever held any public office?

A. Just county commissioner.

Q. Of Osage County?

A. Yes sir.

Q. Have you visited the Federal penitentiary?

A. No sir, I never have.

Q. Do you know the warden, Mr. Morgan?

A. No sir.

Q. Do you know anybody connected with the Federal penitentiary?

A. No sir.

Q. Have you any relatives that are in the employ of the government at this time?

A. I have a cousin.

Q. Where is he employed?

A. In the National Army.

Q. He is a soldier, is he?

A. A colonel.

Q. A colonel—but you have no one who is holding a public office?

185 A. No sir.

Mr. Andres: That is all.

CHARLES SIMMONS, called as a juror, having been duly sworn, testified as follows, touching his qualifications as a juror, to sit in this case:

Questions by Mr. Robertson:

Q. Where do you live?
A. Ottawa, Kansas.
Q. What is your business?
A. I work for a railroad.
Q. Railroading?
A. Yes sir.
Q. In what capacity?
A. Checking freight and looking after lost freight, and office work.
Q. How long have you been in the railroad service?
A. For the last year.
Q. What is your company—what company are you with?
A. Chicago, Milwaukee & St. Paul.
Q. Where is your place of work?
A. Kansas City.
Q. Kansas City, Missouri?
A. Yes sir; Kansas City, Mo.
Q. How long has your home been in Ottawa?
A. All my life.
Q. What was your business before entering railroad service?
A. Prison work.
Q. Whereabouts?
A. Lansing, Kansas.
Q. At the State penitentiary here?
A. Yes sir.
Q. How long were you there?
A. Nearly four years.
Q. What was your business there?
A. An officer of the prison.
Q. A guard?
A. Yes sir.
Q. Have you ever had any business with the Federal penitentiary?
A. No sir—I have visited it.
Q. You have been there, I suppose?
A. Yes sir.
Q. You know Mr. Morgan, I take it?
A. Yes sir.
186 Q. Have you heard the purported facts in this Stroud case?
A. I have read about it.
Q. Did you obtain enough about it so that you now have an opinion as to the guilt or innocence of this defendant?
A. Yes sir.
Q. Is that such an opinion that you could not discard it and take up the trial of this case on what you get here in the court room and decide it alone on what you get here?

A. I don't know, just in that way, but I feel strongly the other way, that it would.
Q. You feel that the opinion you have got would stand in the way of your doing justice?
A. Yes sir.
Q. Have you talked with people who claimed to be witnesses?
A. Officers of the prison.
Q. Officers of the Federal penitentiary?
A. Yes sir.

Mr. Robertson: I think the juror is disqualified.
The Court: Stand aside.

JOHN DOYLE, called as a juror, having been duly sworn, testified as follows as to this qualifications to sit as a juror in this case:

Questions by Mr. Robertson:

Q. Where do you iive, Mr. Doyle?
A. In Geary county, near Junction City.
Q. What is your business?
A. Farming.
Q. How long have you lived there?
A. 48 years.
Q. Born there?
A. Yes sir.
Q. How far is that from Leavenworth?
A. Well, I guess it is about eighty miles across the country, but it is about 135 or 140 miles the way we have to come.
Q. Have you heard anything about this case more than what has come to you in the court room?
187 A. I suppose I have read about it before, but I never remembered of it until I recalled it when I came here.
Q. Have you heard enough now so that you have an opinion?
A. No sir, none whatever.
Q. Have you any feeling against capital punishment?
A. No, I have not.
Q. Are you free to do what you think is justice in that matter, if you are chosen here as a juror?
A. Yes sir.
Q. If the law and the evidence justify it, you would vote for that kind of a verdict—you would be willing to do that?
A. Yes sir.
Q. You would have no hesitancy at all if you feel that the facts justify it?
A. No sir.
Q. Have you any family?
A. No sir. I am a single man.
Q. A bachelor?
A. Yes sir.
Q. A farm owner out there?
A. Yes sir.

Q. Are you the Mr. Doyle whose title I had occasion to pass on a short time ago?
A. No. I believe he was from Geary county, but it was not I.
Q. You know who it was?
A. I know of him, but it was no relative of mine.

Questions by Mr. O'Keefe:

Q. Are you personally acquainted with any of the prosecuting attorneys in this case?
A. No sir.
Q. Have you ever been out to the Federal penitentiary?
A. No, I never have.
Q. Know nothing about the case except what you have read?
A. I have read it over, but that is all.
Q. And from what you have read, you formed and expressed no opinion whatever?
A. None whatever.
Q. If you were chosen as a juror in this case, you would under the instructions of the Court give the defendant the benefit
188 of the doubt?
A. I would—yes sir.
Q. And would not convict him unless you were convinced beyond a reasonable doubt that he was guilty?
A. No sir.
Q. You know of no reason why you could not try this case fairly and impartially according to the law and the evidence?
A. No sir.
Q. You would try to do that?
A. Yes sir.

Mr. Andres: That is all.

C. C. WALLACE, called as a juror, having been duly sworn, testified as follows touching his qualifications as a juror to sit in this case.

Questions by Mr. Robertson:

Q. What is your name?
A. C. C. Wallace.
Q. Where do you live?
A. Saline county, Kansas.
Q. How long have you lived in Saline county?
A. Thirty-seven or eight years.
Q. Have you heard anything about this case, more than what has occurred here in the court room?
A. Just what I have heard here.
Q. Have you heard enough so that you now have an opinion as to the guilt or innocence of the defendant?
A. I have not.
Q. What is your business?
A. Manager of a telephone company.

Q. How long have you been in that business?
A. Nine years.
Q. What business were you in before that?
A. A school teacher.
Q. In Saline county?
A. Saline and Ellsworth counties.
Q. Have you a feeling of opposition to capital punishment?
A. I have none.
Q. Do you feel that if you are a juror here that you are in position where you can act with entire freedom and exercise your
189 option entirely unhampered in that matter?
A. I do.
Q. And you will do it, if you are chosen as a juror?
A. Yes sir.
Q. Have you ever been a juror in any court?
A. Yes sir, I have.
Q. You understand that cases are to be decided solely on what you get in the court room?
A. Yes sir.
Q. And you feel that rule is a just one?
A. I do, yes sir.
Q. Are you a married man?
A. I am not.
Q. Have you been a bachelor all your life?
A. All my live.
Q. What is the name of your telephone company?
A. Brookville Telephone Company.
Q. Does that have any other exchanges than Brookville?
A. No, just the one.
Q. Do you get over into Marion county?
A. No sir, not at all.

Questions by Mr. O'Keefe:

Q. Are you wersonally acquainted with any of the prosecuting officials in this case?
A. I am not.
Q. You never heard of this case before?
A. Not to my knowledge, until I came here.
Q. You didn't read about it?
A. Not that I recall.
Q. Would the mere fact that this man was in the penitentiary at the time of the occurrence of this matter so prejudice you that you could not be a fair and impartial juror?
A. No sir, it would not.
Q. Would you give the defendant under the court's instruction, the benefit of a reasonable doubt, and not convict him unless you believed from the efidence beyond all reasonable doubt that the defendant was guilty?
A. I would.
Q. And not convict him of the crime as charged?
A. Yes sir.

Q. Do you know of any reason why you could not try this case fairly and impartially according to the law and the evidence?

A. I do not.

Q. And if chosen you would do so?

A. I would.

Mr. O'Keefe: That is all.

WILLIAM TANNER, called as a juror, having been duly sworn, testified as follows touching his qualifications as a juror to sit in this case:

Mr. Tanner: I spoke to you about having some wheat, and I have a boy that is coming to help cut it; and I fear we may lose it if we fail to get it cut this week. (Statement partially indistinct.) I would like to be excused if possible.

The Court: If these other gentlemen have no better excuse than you have, you will be excused later. If they are all in worse condition than you are, we will have to hold you.

Questions by Mr. Robertson:

—. Have you heard anything about this case, more than what has occurred in the court room?

A. I read about it at the time it happened, and then here.

Q. Have you an opinion now as to the guilt or innocence of the defendant?

A. No sir.

Q. Have you a feeling of prejudice against capital punishment?

A. No sir.

Q. You feel perfectly free on that point?

A. Yes sir.

Q. What county do you live in?

A. Wyandotte county.

Q. Wyandotte county?

A. Yes sir.

Q. What part of the county?

A. Piper, half way between here and Kansas City, 22 miles.

Q. How long have you lived there?

A. 38 years.

Q. Do you know any of the parties that you see interested in this case, lawyers or otherwise?

A. No, sir. I met you the time I was up here before. Mr. Malott gave me an introduction—that is the first time I ever met you.

Q. Do you know of any reason why you would not make a fair juror in this matter?

A. No, sir, I do not.

Q. Are you a married man?

A. Yes, sir.

Q. A farm owner?

A. Yes, sir.

Q. What family have you?

A. Three sons and two daughters. Two sons in the family, that are at home. The other is a railroad foreman——

Q. He is the one that came home to help cut the grain?

A. He is the one that came home to help cut the wheat.

Questions by Mr. Kimbrell:

Q. You realize that the charge here against Stroud is first degree murder?

A. Yes, sir.

Q. And you also realize that there is a difference in the sentiment in the entire country about capital punishment, some favor it, we all know, for murder, and some oppose it?

A. Yes, sir.

Q. How do you stand on that?

A. Well, it is owing to the testimony.

Q. You don't favor capital punishment in all cases of first degree murder, then?

A. No, sir, not in all cases.

Q. But might in some cases?

A. Yes, sir.

Q. Have you ever served as a juror in a murder case?

A. No, not in a murder case.

Q. But you have served on juries in your county?

A. Yes, sir.

192 Q. As you know, the defendant here is a prisoner in the Federal prison, and has been ever since he was a boy, a young fellow, and he killed a guard who was in authority over him, and his defense is this: that this killing occurred on a Sunday; that on Saturday night's supper he talked to his companion, which was an infraction of the prison rules, that Mr. Turner approached him and took his number, that, because his brother from Alaska was coming to see him, he didn't want to be punished for the infraction of the prison rule and wanted to talk with the guard about that, and that on this Sunday he approached him and attempted to talk to him, that the guard lost his temper and attempted to strike him and he killed him in self-defense. That is a brief statement. Now would the fact that he was a prisoner and the man killed was a guard there in authority over him, prejudice him in your mind, in the exercise of his right of self-defense?

A. No, sir, it would not.

Q. You would think he had the right to exercise his self-defense the same as anybody else?

A. Yes, sir, I would.

Q. You say you met Mr. Robertson?

A. Yes, sir, I met him down here at the hotel.

Q. Who was Mr. Malott?

A. He is an assistant to Mr. Robertson who used to be our county superintendent.

Q. I take it you didn't discuss any facts in this case?
A. No, sir.
Q. Would the fact that you met these gentlemen influence you in the consideration of this case?
A. Not a bit in the world.

Mr. Kimbrell: That is all.
The Court: The government may challenge.
Mr. Robertson: The government will accept the jury.
193 The Court: The defendant challenges?

Juror W. F. McConnell: I don't know the proper time to enter a claim for excuse; if it is proper at this time I would like to enter my claim. I am director of the school board at home, and on next Friday I am expected to preside at a meeting held there, at the War Savings Stamp sale—I didn't know then—there is lots of work to be done if the matter is attended to properly—I have not asked to be excused from that work; I didn't know whether I would be done here or not.
The Court: From what these gentlemen say, I rather think we may get away by Friday.
Mr. McConnell: Now, again, I don't know whether it is a just claim or not—it is important to me, however; on Wednesday evening, I have a niece that is to be married, and I hate very much to be absent. For those two reasons I would like very much to be excused.
The Court: What is the name?
Mr. McConnell: W. F. McConnell.
The Court: We will consider it later.
Mr. O'Donnell: If the court please, another question of interest: Have we got a right to exercise, to make, peremptory challenges at any time before the jury is sworn?
The Court: Yes; you may announce the name right now that you challenge first.
Mr. O'Donnell: I understood Mr. Robertson, at one time in
194 this Court claimed that if we made one challenge and didn't make all we were entitled to, that we were precluded from exercising that right again as to those then in the box.
The Court: What right is that, I don't understand?
Mr. O'Donnell: That is, if we challenge one juror now, then does that operate to accept the other 11?
A. Oh, no.
The Court: Oh, no.
Mr. O'Donnell: That is all.
Mr. O'Keefe: We excuse the gentleman here.
The Court: You excuse Mr. Tanner, you say?
Mr. O'Keefe: Yes, sir.
The Court: Stand aside, Mr. Tanner.

FRANK MANGLESDORFF, called as a juror, having been duly sworn, testified as follows touching his qualifications as a juror to sit in this case:

Questions by Mr. Robertson:

Q. Where do you live, Mr. Manglesdorff?
A. Atchison.
Q. What is your business?
A. Banking business.
Q. What bank are you with?
A. Atchison State Bank.
Q. Have you heard anything about this case?
A. I read something in the newspapers and heard something previous to our coming down here.
Q. Have you heard enough about it so that you have an opinion now as to the guilt or innocence of the defendant?
A. No, sir.
Q. Have you a prejudice against capital punishment?
A. Depending upon the evidence.
Q. You mean by that you are free to do what the evidence and the instructions of the court justify?
A. Yes, sir.
195 Q. If the facts and the instructions of the court justify the extreme penalty in this case would you be free in this case, do you think, to vote for that sort of verdict?
A. I would.
Q. How long have you lived in Atchison?
A. All my life.
Q. Were you formerly with the seed concern up there?
A. Yes sir.
Q. Manglesdorff Brothers—what is the name if that concern now?
A. Manglesdorff Seed Company.
Q. You are still interested in that business, I suppose?
A. Yes sir.
Q. Are you a married man?
A. I am married.
Q. Do you know of any reason at all why you should not sit as a juror in this case?
A. None whatever.
Q. You heard the statement I made in this case?
A. Yes sir.
Q. You have heard the examination of the gentleman who preceded you?
A. I did.
Q. Taking it all together, do you feel that you are free to do exact justice here as a juror?
A. I think so, yes.

Questions by Mr. O'Keefe:

Q. You say you have read of the case?
A. Yes.
Q. When did you first read about the case?
A. When it first happened, sometime ago.
Q. What paper did you read at that time?
A. Kansas State Journal and the Leavenworth papers.
Q. Did you follow it up in the newspapers at that time?
A. Just for a short time.
Q. You followed it up in the papers as the articles appeared at that time, did you?
A. Yes sir.
Q. Have you read of it since?
A. No.
Q. In what paper especially was it talked about?
A. I could not say.
196 Q. Did you talk of it?
A. No sir.
Q. Did you form or express any opinion as to how the deceased came to his death?
A. No.
Q. Did you form or express any opinion as to whether the defendant in this case actually killed him or not?
A. No sir.
Q. Still, you read it in the newspapers?
A. Yes sir.
Q. Have you read of it since being called as a juror here?
A. No.
Q. Have you talked of it since being called as a juror here?
A. No.
Q. Were you chosen on the regular panel or afterwards?
A. On the regular panel.
Q. The defendant in this case pleads self-defense: Now if, from the evidence in this case you believe that he entertained the belief at the time he struck the fatal blow that the guard was about to kill him or inflict great bodily harm upon him, and the court should instruct you if you have a reasonable doubt from the evidence as to the true facts, you should give the defendant the benefit of the doubt, would you give the defendant the benefit of the doubt?
A. If the court instructs so, I would give him the benefit of the doubt.
Q. Would the fact that he was a prisoner at the time that this occurrence took place, would that actuate you in the trial of the case?
A. It might have some effect upon it, yes.
Q. Would it, irrespective of the evidence in the case have an effect upon you, do you think?
A. I think it would have a little effect upon me, yes.

Mr. O'Keefe: We challenge.
The Court: You may inquire, Mr. Robertson, if you wish

197 Questions by Mr. Robertson:

Q. What we want to get at, in line with those questions last asked you, Mr. Manglesdorff, is this: can you go on and try this case on what you get here in the court room, and do justice in the case, between the government and the defendant, notwithstanding the fact that this man may be a convict up here in the prison?

A. I might be inclined to hold it a little to his discredit.

Q. Now, can you see that a convict might be entitled and is entitled to his rights under the law just the same as one who is not a convict would be?

A. Yes.

Q. Can you give him the benefit of that as a juror?

A. I could do that, but the two working together in my mind might affect it.

Q. You mean to say that you could not forget that he was a convict?

A. No, I could not forget that.

Q. Would the fact that he was a convict influence your verdict, if you were chosen as a juror here?

A. Possibly so.

Q. Let us disregard possibilities, if we can; what I want to get at is, if you are in the frame of mind that you can take this case and try it upon what you get in the court room and on that alone?

A. I don't think I could entirely disregard the fact that he was a convict.

Questions by the Court:

Q. Well, would it have any effect on you in reaching a verdict?

A. It might have.

Q. What is your best judgment as to whether or not it would have?

—. Well, I think—I would rather say that it would have an effect on me.

Q. The fact that the defendant might be shown to be a convict, and held in the penitentiary at the time it is claimed this
198 crime was committed, would have an effect on you in reaching a verdict in the case—is that what you mean to say?

A. Yes.

Q. And you could not free yourself from that view and render a verdict in the case?

A. I don't think I could entirely.

The Court: Stand aside.

WILL MYERS, called as a juror, having been duly sworn, testified as follows as to his qualifications as a juror to sit in this case:

Questions by Mr. Robertson:

—. Where do you live, Mr. Myers.

Mr. Myers: Why, I would like to make a little claim: we are in

the midst of harvest—started yesterday afternoon—160 acres of wheat there, and nobody to look after it at home.

Q. What is your name?
A. Will Myers.
Q. Where do you live?
A. Beloit, Mitchell County.
Q. How long have you lived there, Mr. Myers?
A. 33 years.
Q. What is your business?
A. Farming.
Q. Have you heard about this caes enough so that you have an opinion as to the guilt or innocence of the defendant?
A. Why, No sir.
Q. You have heard of the case?
A. Just heard of it.
Q. Have you any opinion now as to the guilt or innocence of the defendant?
A. No sir.
Q. Have you any feeling of opposition to capital punishment?
A. Yes sir, I don't believe in capital punishment.
Q. Does that feeling go to that extent that it would prevent your voting for that verdict in this case that might mean taking the life of the defendant?
A. I don't understand that.
199 Q. Is your feeling such that you would not under any circumstances vote for the extreme penalty?
A. Capital punishment?
Q. Yes?
A. Yes sir.
Q. You could not under any circumstances vote for the death penalty?
A. No sir, I don't believe I could.

The Court: You are excused.

Mr. O'Donnell: And to the action of the court in excusing the juror the defendant excepts for the reason that he is a qualified juror.

And to this action of the Court defendant still excepts.

M. B. HOWDEK, called as a juror, having been duly sworn, testified as follows touching his qualifications as a juror to sit in this case.

Questions by Mr. Robertson:

Q. What is your name?
A. M. B. Howdek.
Q. Spell it, please?
A. H-o-w-d-e-k.
Q. Where do you live?
A. Republic county.
Q. What post office?
A. Agenda.

Q. How far do you live from Leavenworth?
A. 130 miles.
Q. What is your business?
A. Farming.
Q. Have you heard anything about this case?
A. I have.
Q. Enough so that you now have an opinion as to the guilt or innocence of the defendant?
A. I have.
Q. Is that a fixed opinion in your mind?
A. It is.
Q. Is that opinion such that it would prevent you being a fair juror here?
A. Yes, it is.
Q. Did you talk with witnesses in the case?
A. No, I have not.
Q. Where did you get your opinion in the case?
A. Read in the papers about it and heard them talking
200 when I was coming up here in May.
Q. Did somebody relate the story to you about it?
A. No, I heard some gentleman sitting behind me, the next seat, talking about it.
Q. And you have made your mind up as to how it ought to be disposed of?
A. I have so far, yes sir.
Q. You think you could not disregard your opinion and go on and try this case on what you get here?
A. I could from the evidence.
Q. Let us see, then; can you sit down here as a juror, and forget your opinion and try this case on just what you get here?

Mr. O'Keefe: That is objected to; we hardly think that is a fair question to ask of the juror.
The Court: Go ahead.

And to this ruling and action of the court defendant then and there duly excepted and still excepts.

Q. Can you disregard and forget any opinion you might have had and try this case on the facts you get here and the instructions of the court?
A. I believe not.

The Court: You will be excused. Call another juror.

R. W. TRIMBLE, was then called as a juror.

Mr. Robertson: Mr. Trimble, if your Honor please, is the gentleman that spoke to you about being appointed to a government position in Washington.

Mr. Trimble was then excused by the court, without objection from either side.

201 N. C. BRACKEN, called as a juror, having been duly sworn, testified as follows as to his qualifications to sit as a juror in this case:

Questions by Mr. Robertson:

Q. Where do you live, Mr. Bracken?
A. Phillipsburg, Phillips county, Kansas.
Q. What is your business?
A. Book-keeper in a bank.
Q. What bank?
A. First National.
Q. First National Bank?
A. Yes sir.
Q. Have you heard anything about this case?
A. Nothing only what I have heard here and read in the papers.
Q. Have you an opinion now as to the guilt or innocence of the defendant?
A. I have not.
Q. Do you know the defendant or any of his counsel?
A. No sir.
Q. Have you any feeling of prejudice against the administration of capital punishment?
A. No sir.
Q. You are not prejudiced against the Federal law in that regard?
A. No sir.
Q. Have you sat on juries before?
A. I never did.
Q. Not in any court?
A. No sir.
Q. I suppose you understand that the cases are tried in court and decided upon what you get in the court room?
A. Yes sir.
Q. If you are a juror it will be your duty, to so try and decide this case on the evidence you get here, and whatever the facts are and the law will justify ought to be your verdict?
A. Yes.
Q. You feel perfectly free to do what the facts and the law may justify in the way of a verdict in this case?
A. Yes sir.
Q. No matted how severe it may be?
A. Yes sir.

202 Q. Are you a married man?
A. My wife is dead.

Questions by Mr. O'Keefe:

Q. Mr. Bracken has anyone spoken to you of this case before?
A. No sir, they have not.
Q. Are you acquainted with the prosecuting officials in the trial of this case?
A. I am slightly acquainted with Mr. Robertson.

Q. Is the acquaintance that you have with him a personal one or an ordinary passing acquaintance?
A. An ordinary passing acquaintance.
Q. You say you have read of this case in the newspapers?
A. Yes sir.
Q. Did you read of it at the time of the occurence or when?
A. At the time of the occurence.
Q. What papers did you read at that time?
A. In the State Journal and Kansas City Star and Lawrence Capital.
Q. You take two or three papers I believe?
A. Yes sir.
Q. Did you follow the case?
A. I just read the headlines; I never followed it.
Q. Now, since reading of the case at its inception, at the time it occurred, have you read of it since?
A. I think not.
Q. Did you know when you were summoned here as a juror what trial you were coming in on?
A. No sir.
Q. Did you talk to anybody on the way in about this case?
A. No sir.
Q. Did you ever talk with anybody about it?
A. No sir.
Q. Have you heard anybody talk about it?
A. In the Court room, that is all.
Q. Were you here on the 23rd of May?
A. Yes sir.
Q. At that time did you hear any expressions in the Court room concerning the case?
A. Yes sir.
203 Q. Did you talk about it afterwards?
A. Well, not that I know of—in a general way, perhaps.
Q. From what you read and heard, have you formed and expressed any opinion as to whether or not the defendant in this case killed the man or not?
A. I think not.
Q. Are you related to Joe Brackett in Kansas City?
A. No, you have the name wrong—it is Bracken.
Q. Are you related to the gentleman I mentioned?
A. No sir.
Q. If you are chosen as a juror in this case do you believe you would give a fair and impartial trial according to the law and the evidence?
A. Yes sir.
Q. When it came down to the matter of defense, would the fact that this man was a prisoner in the Federal penitentiary at that time influence you in your verdict?
A. I don't think so.
Q. If you believed that— if you were of the opinion that, at the time the fatal blow was struck, the defendant believed that it was

necessary for him to do so to save his life or save himself from great bodily harm, and if the court instructed you that if he so believed that he acted in self-defense and you should not convict him, would you obey the order of the Court?

A. Your question is a little lengthy—I do not know that I quite understand it—I don't know that would have anything to do with it so far as his opinion was concerned, but on the evidence he would have to show that he shot in self-defense, I would say.

Q. If you had the evidence before you, and the court said to you that if you entertained a reasonable doubt as to whether or not he struck in self-defense, you should acquit, would you obey the order of the court?

A. Yes.

204 Q. Are you acquainted with any of the officials of the penitentiary?

A. No sir.

Q. Do you know Mr. Morgan?

A. No sir.

Q. Have you been around the penitentiary any?

A. No sir.

Q. Do you know of any reason, Mr. Bracken, why you could not try this case fairly and impartially according to the law and the evidence?

A. No sir.

Q. Do you know Mr. Robertson?

A. I know him, yes; in a general way.

Q. How long have you known him?

A. About ten years.

Q. Have you had business relations with him?

A. No sir.

Q. Would the fact that he is prosecuting attorney in this court tend to influence you in the trial of the case in any way?

A. No sir.

Q. And you would try this case as fairly and impartially as if you didn't know anybody in the case?

A. Yes sir.

(By Mr. O'Donnell:)

Q. Would it embarrass you to find against his contention?

A. No sir.

Mr. Andres: May I ask the juror a question?

The Court: Yes.

(By Mr. Andres:)

Q. Mr. Bracken, you say that in considering the question whether or not he thought his life in jeopardy——

The Court: I think we will have to control that by instruction.

Q. —you said that the defendant's opinion would not have any thing to do with it: if, on the other hand the court instructed you that you would have to take this into consideration——

The Court: Mr. Andres, you are speculating. You don't know what the court will instruct. If we get into that field, you might talk to a juror all day.

205 And to this ruling and action of the court defendant then and there duly excepted and still excepts.

The Court: Do you accept this juror, Mr. Robertson?

Mr. Robertson: Yes sir.

The Court: Defendant's challenge.

Mr. O'Donnell: We will excuse Mr. Bracken.

E. L. CARSON, called as a juror, having been duly sworn, testified as follows touching his qualifications to sit as a juror in this case.

Questions by Mr. Robertson:

Q. Where do you live, Mr. Carson?
A. Clifton, Washington county, Kansas.
Q. What is your business?
A. Farmer.
Q. How long have you lived there?
A. About 45 years.
Q. How far is that from here?
A. About 160 miles.
Q. Are you a native Kansan, too?
A. No sir.
Q. Have you heard anything about this case?
A. Just when I was here two or three weeks ago.
Q. About a month ago?
A. Yes sir.
Q. Have you an opinion now as to the guilt or innocence of this defendant?
A. I have not.
Q. Have you a feeling of opposition to the administering of the death penalty in murder cases?
A. No sir.
Q. You have no opposition to that?
A. No sir.
Q. You have heard the statement of mine here as to what this case was about?
A. Yes sir.
Q. And as to the different forms of verdict that can be considered by the jury?
A. Yes sir.

Q. And without knowing the facts in the case before us,
206 you have not now an inborn feeling of favoritism for any sort of verdict you have heard talked about here?

A. I have not.

Q. You feel you are a free man on that question?
A. Yes sir.
Q. Are you a farm owner?
A. Yes.
Q. Have a family?
A. Yes sir.
Q. How large?
A. Four children; a girl 24, a boy 12, a girl six years old and a girl nine years old.
Q. Have you ever served on a jury before?
A. In a civil case, only once.
Q. In the District Court?
A. In the District Court.
Q. At Clay Center?
A. At Clay Center.
Q. Do you know any reason at all why you would not make a fair juror?
A. I do not.

Questions by Mr. Kimbrell:

Q. The prisoner here is charged with killing a guard: he was a prisoner at the time and the guard, of course, was in authority over him. His defense is that the guard, because of some civil question the defendant asked of him and some argument about it, lost his temper; so did he; that the guard attempted to strike him with his club and he took hold of him and tried to hold him, and finally struck the guard in what he claims was self defense: would the fact that he was a prisoner under the guard, that he killed the man in authority over him, prejudice you in considering the evidence on the question of self defense?
A. I believe it would not.
Q. You would give him the same fair consideration, so far as looking to the evidence is concerned, as you would if he were a man outside, and the man he killed was his neighbor, in a like controversy?
A. Yes sir.
207 Q. That is the way you feel about it?
A. Yes sir.
Q. Do you believe in capital punishment?
A. I don't generally believe in it, but it is wholly depending on the nature of the case.
Q. You do believe in capital punishment for some crimes?
A. Yes sir.
Q. You believe in it as a policy?
A. Yes sir.
Q. As a proper way to enforce the law?
A. Yes sir.
Q. Do you favor that rather than life imprisonment?
A. I do not.
Q. It depends upon the circumstances?
A. Yes.

Mr. Kimbrell: That is all.
Mr. O'Donnell: Defendant challenges Mr. C. C. Wallace.

Mr. C. C. Wallace was then excused upon defendant's peremptory challenge.

J. E. VAWTER, called as a juror, having been duly sworn, testified touching his qualifications to sit as a juror in this case, as follows:

Questions by Mr. Robertson:

Q. What is your name?
A. J. E. Vawter.
Q. Where do you live?
A. Oakley, Logan county, Kansas.
Q. What is your business?
A. Banking business.
Q. How long have you been there?
A. All my life.
Q. How old are you?
A. Twenty-six years old.
Q. What position do you occupy in the bank?
A. Assistant cashier.
Q. Who is cashier?
A. F. W. Irwin is cashier.
Q. Who is president?
A. J. Davenport.
Q. Wess Davenport?
A. Yes.
208 Q. Have I ever met you personally?
A. Not that I remember of.
Q. Have you heard anything about this case more than what his happened here in the court room?
A. Only what I read in the Kansas City paper about a week ago.
Q. Have you any opinion now as to the guilt or innocence of the defendant?
A. Not that I know of.
Q. Have you any feeling as to the administration of capital punishment?
A. I don't believe in capital punishment.
Q. Is that belief such a one as would prevent your voting for one, for a verdict that meant death?
A. I believe it would.
Q. Do you say it would?
A. It would.

The Court: You are excused.
Mr. O'Donnell: Defendant object- to the action of the court in excusing the juror.

And to the action and ruling of the court in excusing the last named juror, defendant then and there duly excepted and still excepts.

H. M. FARR, called as a juror, having been duly sworn, testified as follows touching his qualifications to sit as a juror in this case:

Questions by Mr. Robertson:

Q. What is your name, please?
A. Hartley N. Farr.
Q. Where do you live?
A. Kansas City, Kansas.
Q. What is your business?
A. Conductor for the Kansas City Railways.
Q. What line do you run on?
A. Argentine.
Q. From Argentine to Kansas City, Missouri?
A. Yes sir.
Q. How long have you lived in Kansas City, Kansas?
A. Eight years.
Q. Where did you live prior to residing there?
209 A. Western Oklahoma.
Q. Are you a married man?
A. Yes sir.
Q. How large a family have you?
A. Three children.
Q. Have you heard about this case enough so that you have an opinion as to the guilt or innocence of the defendant?
A. Yes sir, I read about this case in the paper and I also know the defendant's wife; she has also talked to me and told me of the case.
Q. His mother, you mean?
A. His wife.
Q. This is the Robert F. Stroud case here—he is not a married man?
A. Whatever it is—this lady told me something, some facts—I presumed it was his wife.
Q. Who was the lady?
A. She was a lady in Kansas City.
Q. Somebody you don't know?
A. Not exactly; I met her in a restaurant and she told me of something—it was just a story I thought was something like this after I read it in the paper.
Q. When was this?
A. Three or four months ago.
Q. Where?
A. At that restaurant at 12th and Broadway—I was eating supper.
Q. That happened since you have been summoned as a juror?
A. No, before.

Q. What kind of looking person was it talking to you—can you describe her?

A. Well, she was rather fleshy, not fat either, with dark hair and black eyes.

Q. Do you have an opinion now as to the guilt or innocence of the defendant—the question is have you got an opinion in your mond?

A. Well, I believe I have.

Q. Is that a fixed opinion that it would take evidence to change?

A. Yes sir.

Q. Would you have to hear evidence before you would
210 change it?

A. Yes sir.

Mr. Robertson: We challenge the juror for cause.

The Court: What does the defense say?

Mr. Kimbrell: No questions.

The Court: Do you join in the challenge?

Mr. Kimbrell: Yes sir.

The Court: The juror will be excused.

ELMER WILLIAMSON, called as a juror, having been duly sworn, testified as follows touching his qualifications as a juror:

Questions by Mr. Robertson:

Q. Where do you live, Mr. Williamson?

A. Near Washington.

Q. Washington county?

A. Yes.

Q. What is your business?

A. Farmer.

Q. How long have you lived in Washington county?

A. About twenty-five years.

Q. Have you heard about this case?

A. No sir.

Q. Have you any opinion now as to the guilt or innocence of the defendant?

A. No sir.

Q. What is your business?

A. Farmer.

Q. Have you always been engaged in farming?

A. Yes sir.

Q. Brought up on a farm?

A. Yes sir.

Q. In Washington county?

A. Yes sir.

Q. What part of Washington County?

A. It is the north central.

Q. How far from the city of Washington?

A. Five miles.

Q. North of Washington?

A. West.

Q. Are you opposed to capital punishment?

A. No sir, if the crime justifies it.

Q. Well, that is assumed in the question, that conditions would have to justify it, of course. You have heard the examinations of these other gentlemen, have you not?

A. Yes sir.

211 Q. And you understand from that in the matter of a first degree murder, that there are two different kinds of verdicts?

A. Yes sir.

Q. Have you a distinct preference to either one as you approach this case, not thinking about what the facts may or may not be—have you fixed preference now?

A. For this particular case?

Q. For any case—have you a fixed preference between life imprisonment and the death penalty?

A. Yes sir, I have.

Q. Is that such a fixed preference that you would not be able to vote for a verdict of murder in the first degree that meant death, when you could vote for the other, life imprisonment?

A. State the question again, please.

Q. I understand you to say that you have a fixed preference, now, as between these *there* two forms of verdict?

A. Yes sir.

Q. Is that such a fixed preference that it would affect your verdict, if you were chosen in this case?

A. Yes sir, I believe so.

Q. You mean that you would not be able to vote for a verdict that meant death, no matter what the facts were?

A. I misunderstood you. I meant to answer; yes I believe in capital punishment for first degree murder.

Q. For first degree murder?

A. Yes sir.

Q. I take it then you are perfectly free here, as far as that question is concerned?

A. Yes sir.

Q. Are you a married man?

A. Yes sir.

Q. What family have you?

A. Two children.

Q. Do you know of any reason at all, why you should not sit in this case?

A. No sir, I don't know of any.

Q. Have you been a juror before?

A. In the District Court.

212 Q. Out there in Washington county?

A. Yes sir.

Q. You learned there, I take it, that the cases are to be decided upon what takes place in the court room?

A. Yes sir.

Q. And the court tells you what the law is?

A. Yes sir.
Q. And will you obey what the court will tell you the law is?
A. Yes sir.
Q. And you will try the case according to the evidence from the witnesses and take the law given you by the court?
A. Yes sir.
Q. That will be your mission?
A. Yes sir.

Questions by Mr. O'Donnell:

Q. Mr. Williamson, you say you believe in capital punishment in cases of first degree murder. You may state whether that is the only kind of punishment you believe in in cases of that sort?
A. Yes sir, it is.
Q. And that is the only kind of punishment you would inflict, if within your power, in that sort of case, if it was left for your decision?
A. Yes sir, it is.

Mr. O'Donnell: We challenge the juror for cause.
The Court: Overruled.

And to this ruling and action of the Court defendant then and there duly excepted and still excepts.

The Court: Mr. Robertson, do you accept this juror?
Mr. Robertson: Yes sir.

Mr. H. A. SHEARER was then excused by defendant under peremptory challenge.

C. D. ELDRIDGE, called as a juror, having been duly sworn, testified as follows touching his qualifications to sit as a juror in this case:

213 Questions by Mr. Robertson:

Q. Where do you live, Mr. Eldridge?
A. Topeka, Kansas.
Q. What is your business?
A. Fire Insurance Inspector.
Q. Have you heard the purported facts of this case?
A. Merely read the headings in the papers and passed over it.
Q. Has there been enough brought to you so that you now have an opinion as to the guilt or innocence of the defendant?
A. Nothing more than I might consider it a case of insubordination—it possibly passed through my mind in that way.
Q. You have no opinion as to whether he is guilty or innocent of the charge of murder?
A. No, sir, don't know anything about it, for that matter.
Q. Have you a feeling of opposition against the administration of capital punishment?

A. I have—yes, sir.
Q. A fixed opinion that would affect your verdict, if chosed here?
A. Yes, sir.

Mr. Robertson: I suppose he is disqualified.
The Court: You are excused.
Mr. O'Donnell: Defendant excepts to the action of the court in discharging this talesman.

And to this action of the court defendant still excepts.

E. F. WHITTAKER, called as a juror, having been duly sworn, testified as follows touching his qualifications to sit as a juror in this case:

Questions by Mr. Robertson:

Q. Where do you live, Mr. Whittaker?
A. Troy, Kansas.
Q. What is your business?
A. Farming and elevating business up there.
Q. How long have you lived there?
A. All my life, 50 years.
214 Q. How far is that from Leavenworth?
A. About 55 miles—between 50 and 55.
Q. Have you heard anything about this case more than what has happened here?
A. Yes, sir, I have; I heard a little through the papers here and through the St. Joe News Press a little—not very much though. I never paid much attention to it.
Q. Have you any opinion now as to the guilt or innocence of this defendant?
A. No, sir.
Q. Have you a feeling of opposition to the death penalty?
A. Well, if there is proof enough, yes, sir.
Q. How is that?
A. If you have evidence strong enough.
Q. Well, assuming that the evidence in the case and the instructions of the court warrant it, are you in favor of administering that kind of punishment?
A. Yes, sir.
Q. Have you been a juror in court before?
A. Yes, sir.
Q. In the Federal court?
A. No, sir.
Q. In the District court of your county?
A. Yes, at Topeka, Kansas, and at Troy, Kansas.
Q. Do you know of any reason why you should not be chosen as a juror in this case?
A. No, sir.
Q. Do you know anybody you see interested in the case as lawyers or otherwise?

A. No, sir.

Q. Did you chance to know any other gentlemen who are brought here as jurors?

A. Not except the other gentlemen coming here with me from Troy, Kansas.

Q. Are they sitting here now?

A. No, sir, they are sitting outside.

Q. Brought here as jurors?

A. Yes, sir.

Q. Are they friends of yours—on entirely friendly terms with you?

A. Yes, sir.

215 Questions by Mr. O'Keefe:

Q. Mr. Whittaker, I believe you say you know nothing about the actual facts of the case?

A. No, sir, I don't.

Q. Do you know the prison officials?

A. No, sir.

Q. Do you know the prosecuting attorney, in this case?

A. No, sir .

Q. Now, you say you heard of the matter through the newspapers?

A. That is, I saw what little I saw through the headings of the newspapers.

Q. Did you form or express any opinion as to the guilt or innocence of this man from what you read in the newspapers?

A. No, sir.

Q. Do you believe in the law of self-defense?

A. Why, to a certain extent, yes, sir.

Q. If you believe that the defendant in this case acted in self-defense, you would give him the benefit of that belief, would you?

A. Surely, if the evidence is that way, yes, sir.

Q. Do you know of any reason why you could not try this case fairly and impartially under the law and the evidence?

A. No, sir.

Mr. O'Keefe: That is all.

Mr. O'Donnell: We challenge Mr. McConnell.

Mr. W. F. McConnell was then excused upon defendant's peremptory challenge.

Claude Postal, called as a juror, having been duly sworn, testified as follows touching his qualifications to act as a juror in this case:

Questions by Mr. Robertson:

Q. What is your name?

A. Claude Postal.

Q. Where do you live, Mr. Postal?
A. Winona, Kansas.
Q. Did you hear the purported facts in this case, Mr. Postal?
216 A. Just, only what I heard the other day.
Q. Have you heard enough so that you now have an opinion?
A. No, sir, I have not.
Q. Are you opposed to the death penalty in cases of this kind?
A. Well, that would be according to the evidence in the case.
Q. You mean by that you would exercise your option here between the life imprisonment and the death penalty upon the evidence as you found it here in this case?
A. Yes, sir.
Q. Are you perfectly free to try the case fairly in that matter—you think you are?
A. I think so.
Q. What is your business?
A. I work in a hardware store—clerk.
Q. In whose store?
A. L. A. Jordan, Winona.
Q. How long have you lived there?
A. Thirty-two years.
Q. Are you a married man?
A. Yes, sir.
Q. How long have you been working for Mr. Jordan?
A. 9 years.
Q. Do you know anybody you see connected with this case?
A. No, sir, I don't.
Q. Are you acquainted with any of the attorneys?
A. No, sir.
Q. Or any of the witnesses that you see?
A. No, sir.
Q. Are you acquainted with any of the other jurors that you see here?
A. No, sir, I am not acquainted with any of them.
Q. Is there any reason at all why you could not render a fair verdict, if you are chosen here?
A. I see no reason.
Q. Have you had any business of any sort in the past with the government?
A. None whatever.
Q. You never occupied any government position?
A. No, sir, no government position.

Questions by Mr. Kimbrell:

217 Q. Have you ever acted as a peace officer?
A. No sir, I have not.
Q. Never as a policeman or sheriff or deputy sheriff or constable?
A. No sir, none whatever.

Q. Have you ever held any office?

A. No—the only office I held, I have been a township trustee—not trustee, treasurer.

Q. You believe in the law of self-defense, do you?

A. Yes sir, I believe in self-defense to a certain extent.

Q. Would the fact that the defendant, claiming self-defense, is a convict, and that the one he killed was a guard over him, would it prejudice you against him, his side of the case?

A. No, I don't believe it would—it would be according to the evidence.

Q. He being a prisoner at the time, and the guard being killed, there will be testimony of other guards against him, and of some prisoners in his favor; would you be inclined to give credit to the evidence of the guards rather than the prisoners who sat near about him?

A. Well, I believe he should have his rights.

Q. Well, would you be inclined to favor the testimony of other guards rather than the testimony of prisoners, who might testify in his favor, the guards being against him?

A. Oh, I don't know; I don't believe I would.

Q. You know of no reason why you would not fairly and impartially consider the testimony on the point of self-defense, leaving out of the question the fact that he was a prisoner and some of his witnesses were prisoners—you would leave that out of the question?

A. Yes sir.

Q. And look at the probability of the facts and so forth, established by the evidence, would you?

A. Yes.

Q. Do you favor capital punishment as the punishment
218 for the crime of murder?

A. Well, it would solely depend upon the crime committed.

Q. You know that there is a division of sentiment in our country on that, some people believe in capital punishment in all cases of murder in the first degree; other people don't believe in it in any case—you recognize a division of sentiment on that?

A. Yes sir.

Q. Now, do you believe in capital punishment to the extent that your notion is that a man committing first degree murder should be hanged?

A. Well, to a greater extent, I do.

Q. But you believe that in other cases that sentence may be too severe—is that about your opinion—am I right in that?

A. It might be.

Q. In other words, whether you were willing to inflict a verdict that meant capital punishment would depend upon all the circumstances of the killing?

A. It would depend on the circumstances.

Q. Have you ever served as a juror in a murder case?

A. None whatever.

Q. Have you ever been interested in the prosecution of a first degree murder case, as a witness?
A. No sir.

Further questions by Mr. Robertson:

Q. Did it come to your knowledge, Mr. Postall that complaint had been made to my office about a near relative of yours, in which complaint it was claimed that he had violated the Federal law here a while ago, some weeks ago?
A. A near relative of mine?
Q. Yes, did you hear about it, is what I want to know?
A. Sure, I did.
Q. Did you hear what action I took in the matter?
A. No, I did not.
Q. Or rather what action I didn't take, or did you hear I
219 took no action?
A. I naturally supposed that you did.
Q. What I wanted to get at was whether you felt all right toward me, or whether you understood it or not?
A. Of course that was while I was gone, and I knew very little about it.

Mr. Robertson: It might not be improper to say here, I think, that nothing was done at all, and I wanted to know whether you understood it or not. And I wanted to find out whether you had any feeling against the government in connection with it.

A. I have no hostile feeling against the government in a case like that at all. It makes no difference whether it is a relative of mine or who it was.

Mr. Robertson: That is all.

Questions by Mr. O'Donnell:

Q. Mr. Robertson said something about a relative *you* yours—how close a relative was that relative to you?
A. How close a relative?
Q. Yes?
A. He was my father.
Q. Mr. Postal, do you feel under any obligation to Mr. Robertson, in connection with that transaction?
A. No sir, I don't.
Q. Would what Mr. Robertson did in that transaction cause you embarras-ment if you were to find against his contention in this case?
A. No sir, it would not.
Q. Would it induce you to find in favor of his contention in this case?
A. No, I don't think it would.
Q. Would it cause you to be against his contention in this case?
A. No, it would not.

Q. That is, it would not influence you in one way or the other?
A. No sir.
Q. You would just do your duty as your conscience told
220 you?
A. Yes sir.

Mr. Robertson: The juror is accepted.
Mr. O'Donnell: We challenge Mr. McCloskey.

And thereupon Mr. E. F. McCloskey was excused upon the peremptory challenge of the defendant.

WILLIAM E. OSTERHOLDT, called as a juror, having been duly sworn, testified as follows touching his qualifications to sit as a juror in this case:

Questions by Mr. Robertson:

Q. Where do you live, Mr. Osterholdt?
A. Holton, Kansas.
Q. What is your business?
A. Working in a bank.
Q. What bank are you connected with?
A. State Bank of Holton.
Q. Who is the cashier?
A. Alex Dunn, Jr., is president. P. H. Riley is cashier.
Q. Have you heard what are purported to be the facts in this case?
A. Only what I have heard in this room.
Q. Have you heard anything so that you now have an opinion as to the guilt or innocence of this defendant?
A. No sir.
Q. Have you a feeling of opposition against capital punishment?
A. No sir.
Q. You are free in that matter, are you?
A. Yes sir.
Q. You have heard my statement as to what this case is about?
A. Yes sir.
Q. Are you a married man?
A. Yes sir.
Q. How long have you lived where you now are?
A. A little over thirty-four years.
Q. How far do you live from Leavenworth?
A. 61 miles.
Q. Do you know of any reason at all why you would not make a fair juror in this proceeding?
221 A. Not that I think of now.
Q. You have heard the questions to the men that proceded you here?
A. Yes sir.

Questions by Mr. Andres:

Q. You are engaged in the banking business at Holton, Kansas?
A. Yes sir.
Q. How long have you been there?
A. Pretty near ten years.
Q. Where did you come from when you came to Holton?
A. I was born in Holton.
Q. You spell your name O-s-t-e-r-h-o-l-d-t?
A. Yes.
Q. Now, Mr. Osterholdt, the defendant in this case is a prisoner in the Federal penitentiary, and he was a prisoner at the time that it is claimed that he killed a guard. Would that fact in itself have a tendency to prejudice you against his testimony of self-defense in this case?
A. No sir.
Q. You believe in the right of self-defense, do you?
A. Yes sir.
Q. And you further believe that a man under restraint such as he was, and incarcerated in prison, has just as much right to defend himself against an assault as any person that walks about the street?
A. Yes sir.
Q. Now, it may be that some of his witnesses in this case will be inmates of the Federal penitentiary and some of the government's witnesses are guards and other civilians. Would you give the guard's testimony more weight and consideration than you would the testimony of inmates of the Federal penitentiary, or convicts, simply because the other men were convicts, and the guards civilians?

The Court: I think the juror must necessarily be told in the trial of the case that he may consider the reputation and standing
222 of the different witnesses in determining what weight he will give to the testimony of each witness.

Q. The Court will of course instruct you, undoubtedly, that you have the right to take the character of people into consideration in determining the amount of weight that you will give their testimony. Now, would the mere fact that a man is in the Federal penitentiary as a convict, would that cause you to disbelieve his testimony?
A. It may not exactly cause me to disbelieve it, but it would be against him with me.
Q. It would be against him?
A. With me, yes sir.
Q. Then you would be inclined to favor the testimony of the guards and other civilians as against the testimony of prisoners in the Federal penitentiary?

Mr. Harvey: I suppose that is the last analysis, your Honor, calling for the witnesses conclusion as to what the law is.
The Court: What does the juror say? What were you about to say?

A. It would be harder for me to decide between a guard and a convict than between an outsider and a convict.

Q. And that is so, even though the convict were worthy of belief?

A. I would have no way of knowing that.

Q. Then just the fact that they are in there is sufficient to induce you to look upon their testimony with incredulity, that is, suspicion?

A. Yes sir.

Mr. Andres: We challenge the juror for *cuase*, your Honor.

(By the Court:)

Q. Would you give consideration to the testimony of each witness?

A. Yes sir.

Q. Regardless of what his reputation might be—would you impartially and carefully consider what he said?

A. Yes sir.

223 Q. Although that witness might be a convict?

A. Yes sir.

Q If all the circumstances indicated to you that what he testified to was more in accordance with the true facts than what other witnesses had testified to, would you refuse to accept his testimony as being the true facts?

A. No sir.

The Court: Challenge overruled.

And to this ruling and action of the Court defendant then and there duly excepted and still excepts.

Questions by Mr. Andres (continuing):

Q. What did you mean, Mr. Osterholdt, when you said that the fact that they were in there would cause you to look with disfavor or suspicion upon their testimony?

A. That is what I meant, that it would not strike me as well as testimony from a man that was not. I do not make myself plain, but it would not strike me as worth as much as the testimony of a man that had not been under conviction.

Q. I will put it this way to you: suppose, now, that a guard and a convict happened to have been practically testifying about the same thing, and that their testimony was—that is, that they were—almost contradictory on the same point, and that the convict on the witness stand dem-aned himself in a way that would commend itself to you, and the guard would also, his manner would commend itself to you—which one of those, whose testimony would you give the greater weight and consideration in a case of that kind?

A. I would have no choice, very little choice between a guard and a convict.

Mr. Robertson: I believe I would like to ask the gentleman a few questions:

(By Mr. Robertson:)

Q. Mr. Osterholdt, I think I may say that there will be some witnesses on both sides,—at least, on the government's side, there will be some witnesses who have been convicts up there, as well as
224 men who have never been convicts. If you heard my statement, all of it, you heard me say that this occurrence took place in the dining room of that institution; and I think the evidence will show that there were about 1,200 men there, sitting at the tables eating their meal at noon. So that necessarily there were some 1,200 convicts saw this. Now, then, I take it that you are a judge of humanity, and you would be able to tell from all the circumstances that you see—wouldn't you—and from the appearance of the witnesses, who was telling the truth and who was not?

A. I would try to size the witnesses up.

Q. You would take the personality of the individual, and his manner and all that—you don't mean to take the position that a man who has been a convict could not tell the truth?

A. No sir.

Q. Or if he had been a convict many times?

A. No sir, but I would take some outsider's testimony in preference to his.

Q. There will probably be testimony brought before you—there will be at least some that have been in the penitentiary at least several times—I don't know about the defense, but I know the government has got one or two, and I thought I would be clear upon that—are you going to say before these witnesses take the stand that they cannot tell the truth?

A. No sir.

Mr. Robertson: That is all.

Mr. O'Donnell: I would like to ask Mr. Williamson a further question.

ELMER WILLIAMSON, further examined, testified as follows:

Questions by Mr. O'Donnell:

Q. I don't know whether you fully understood me or not: you stated, as I understood you, that in a case where murder in the
225 first degree was charged and proven, the only verdict you would render would be one for capital punishment. Now, the law is that in such a case, that is, murder in the first degree, the jurors are the absolute judges—it is not in the control of the district attorney or the court or anybody else except themselves and their notion—to discharge their duty under the law, if their consciences are satisfied, in a case of that kind, by rendering a verdict for life imprisonment or for death either one. Now, did you know that that was the law at the time you answered my former question?

A. That the jury may render either verdict?

Q. That the jury may render either verdict?

A. Yes sir.

Q. Understood that was the law at the time you answered my question?
A. Yes sir.

Mr. O'Donnell: We again challenge the juror for cause.
The Court: I don't remember now just what his answer was.
Mr. O'Donnell: His evidence was that in a case of murder in the first degree the only verdict he would vote for would be for capital punishment, if he found defendant guilty.
Mr. Robertson: I think that the prospective juror said in answer to one of my questions that he was perfectly free to render either verdict.
Mr. O'Donnell: His present answer is that he would not exercise that option in favor of any verdict except capital punishment.

Q. If there was proof sufficient, in your mind, to find him guilty of murder in the first degree, the only verdict you would consider would be capital punishment?
226 A. I would be in favor of capital punishment.

The Court: I will overrule the challenge.
Mr. O'Donnell: We except to the ruling of the court, and excuse the juror.

And to this ruling and action of the Court defendant still excepts.

R. STOKES, called as a juror:

Mr. Robertson: This gentleman is a neighbor of mine. I know him and I can state that Mr. Stokes is 85 years old and cannot hear.
Mr. Stokes: I am not claiming exemption on account of my age, but I am absolutely incompetent as a juror on account of my hearing. I cannot hear in here without I come up very close.

Mr. Stokes was then excused by the court without objection by either side.

S. B. STEWART, called as a juror, having been duly sworn, testified as follows, touching his qualifications as a juror to sit in this case:

Questions by Mr. Robertson:

Q. Where do you live, Mr. Stewart?
A. Reserve, Brown County.
Q. How far are you from Leavenworth?
A. Seventy miles.
Q. What is your business?
A. Grain and implements.
Q. How long have you lived in Brown county?
A. 42 years.
Q. Have you in any manner been made acquainted with the purported facts in this case?
A. Not until I came down here a month ago.

Q. Have you heard enough so that you now have an opinion as to the guilt or innocence of the defendant?

A. No sir.

227 Q. Are you opposed to capital punishment?

A. No sir.

Q. You are not opposed to that?

A. No sir.

Q. Have you any particular favoritism between these forms of verdict which have been discussed here?

A. No sir.

Q. You are perfectly free to do what is justice under the facts of the case?

A. Yes sir.

Q. Are you a married man?

A. Yes sir.

Q. How large a family have you?

A. One child.

Q. Do you know any of the parties you see interested in the case?

A. No sir.

Questions by Mr. O'Keefe:

Q. You said you heard of the case a month ago?

A. Yes sir.

Q. In what way did you hear about it then?

A. In the Court room.

Q. Did you read about it?

A. No sir.

Q. Read no newspaper accounts of it at that time?

A. No sir, nothing only what I heard here.

Q. Have you heard anything since?

A. Some.

Q. What papers do you read?

A. The Kansas City papers.

Q. Did you read the article in the Kansas City Times the other day?

A. No sir.

Q. From what you have read and heard, have you expressed any opinion of this case?

A. No sir.

Q. Have you made up your mind as to whether this was a justifiable homocide or not?

A. No sir.

Q. Would the mere fact that this man was a prisoner at the time of this occurrence, would that of itself influence you in the trial of this case?

A. No sir.

Q. Do you know any of the gentlemen on the other side of the case?

A. No sir.

Q. If the evidence in this case disclosed that the man, when he

acted in the occurrence, acted in defense of himself, and the
228 court should say to you that if you believed that or entertained a reasonable doubt whether that was true or not, you should acquit, would you hesitate in doing so?

A. No sir.

Q. Do you know of any reason why you would not try this case fairly and impartially under the law and the evidence?

A. No sir.

Q. Have you ever been an officer of the government?

A. No sir.

Q. Or an officer of the State?

A. Mayor, yes.

Q. What city?

—. Reserve.

Q. Now, as mayor, did you have anything to do with the arresting power of the State?

A. Some, yes.

Q. Well, did you have anything to do with murder cases out there?

A. No sir.

Q. Or with any of the higher crimes or criminal cases?

A. No sir.

Q. The mere fact that you were mayor would not tend to influence you in the trial of this case, would it?

A. No sir.

Q. Have you ever been connected with any murder case?

A. No sir.

Q. There is nothing in your life or the life of your family that might tend to influence you in the trial of such a case as we have on at this time is there?

A. No sir.

Q. Do you know Mr. Morgan, the warden of the penitentiary?

A. No sir.

Q. Or any of the guards?

A. I think not.

Q. Have you been there since you were summoned in this case as a juror?

A. I never was there in my life.

Q. Now, what is your feeling on capital punishment, Mr. Stewart—that is, as to imposing the death penalty in case you find the man guilty of murder in the first degree, and there is an issue on the question of imposing the penalty, how is your feeling on that?

A. It would be according to the evidence on that.

229 Q. Have you any choice between the two—in other words, would you give the defendant the benefit of all doubt in the matter?

A. Yes sir.

Q. That is all.

Mr. Robertson: I would like permission, your Honor, to ask Mr. Postal one question that I neglected.

The Court: Very well.

CLAUDE POSTAL, further testified as follows:

Question by Mr. Robertson:

Q. How far do you live, Mr. Postal, from Leavenworth, just approximately?

A. I think the milage is 393 miles.

Mr. O'Donnell: We will excuse Mr. R. E. Lowery.

E. S. DEAN, called as a juror, having been duly sworn, testified as follows, touching his qualifications as a juror in this case:

Q. Where do you live, Mr. Dean?

A. Oberlin, Decatur county, Kansas.

Q. What is your business?

A. Merchandise business.

Q. Mr. Dean, have you heard the purported facts in this case?

A. Only what I have heard in the court room.

Q. Have you heard enough so that you now have an opinion as to the guilt or innocence of the defendant?

A. No sir.

Q. Have you a feeling of opposition against capital punishment in murder cases?

A. No sir.

Q. Are you perfectly free to exercise your judgment upon the matter of these forms of verdict that have been discussed here by the counsel?

A. Yes.

Q. You heard my statement of what the case is about?

A. Yes.

230 Q. And have you heard the statements of the gentlemen who are sitting by the defendant?

A. Yes sir.

Q. Have these examinations lead you to think of anything that would make you feel you would not make a fair juror here?

A. Well, if the same questions were given me that have been given some of the other jurors, I think there would be some reason.

Q. You think you have some reason for feeling you would not make a fair juror?

A. Yes sir.

Q. Have you in mind any particular question that makes you think so?

A. Yes sir.

Q. What is that question?

A. There is a question in my mind whether I could give the same weight to the evidence of a prisoner that I could to one on the outside.

Q. There is a question in your mind about that?

A. Yes sir.

Q. Don't you believe you could follow the court's instructions on that matter?

A. Well, I am not sure—I would endwavor to do so—I don't know.

Q. I think I am safe in saying that the court will give you full instructions regarding your duty as to whom you should believe, and who you should not believe; I think when you get to that point, the court will give you the law in such a way as to what your privileges and duties are—don't you feel that you can take those instructions, and do your duty in this matter?

A. If I was retained as a juror, I would endeavor to do my duty in that regard.

Q. The court will undoubtedly instruct you that you are to take the demeanor of the witness upon the stand and what you learn of his character and habits and all that into consideration with reference to his credibility. Don't you think that you would be able to follow the court's instructions in regard to that?

231 A. If I was held on the jury, I would follow the court's instructions to the best of my ability, but that thought will come to my mind.

Mr. Robertson: I think we will pass the juror.

Questions by Mr. O'Keefe:

Q. I believe you said, Mr. Dean, you know nothing of the facts of the case?

A. No, sir.

Q. Never read about it or heard about it?

A. I probably read it in the paper, and simply regarded it as passing news, and gave it no thought.

Q. Are you acquainted with the prosecuting officials in the trial of this case?

A. I know Mr. Robertson.

Q. Is that acquaintance an intimate one or otherwise?

A. Well, I have known Mr. Robertson probably for 15 years; I can not say it is an intimate acquaintance.

Q. Would you be more inclined, after listening to the testimony and the instructions of the court, to find in favor of the side he was interested in than you would otherwise?

A. No, sir.

Q. Now, in this case, one of the defenses will be self-defense; that the man believed he was about to be killed at the time that he killed the guard; he was a prisoner. Would the fact that he was a prisoner of itself prejudice you so that you could not weigh his evidence?

A. No, sir.

Q. You believe you could give him the benefit of his evidence in connection with the other circumstances of the case, do you? What I want to know is, would you shut out his evidence entirely, merely because he was a prisoner, or would you consider that with the other evidence?

A. As I said before, I don't know that I could consider a
232 prisoner's evidence the same as I could one on the outside.

Q. But merely outside of considering the fact that one man might be a prisoner and the other was not a prisoner, would you weigh the evidence and consider it?

A. Outside of just the mere matter that he was a prisoner, of course he is entitled to his rights.

Q. You are not of the opinion are you that all prisoners are liars on matters of that kind?

A. No, sir.

Q. You would give his evidence fair consideration, even if he was a prisoner?

A. I would try to, yes, sir.

Q. If the evidence should disclose that at the time this act was done, he was in danger of his life or great bodily harm, or had reason to believe he was and he acted in self-defense, you would find your verdict accordingly, and you would give him the benefit of a reasonable doubt?

A. Yes.

Q. Do you know of any reason why you could not try this case fairly and impartially according to the evidence?

A. No, sir, only as I have stated.

Q. Now, in regard to capital punishment, have you any prejudice against capital punishment?

A. No, sir.

Q. Do you believe that a man should hang for first degree murder?

A. If the crime justifies it.

Q. It would depend upon the facts of the case, would it?

A. Yes, sir.

Q. Now, in this case, you will have the option of life imprisonment or death, if you find he should be guilty of murder in the first degree; would you give the defendant the benefit of the doubt, and give him life instead of death?

A. As I understand, we have that privilege of the two sentences. I would decide upon the evidence given.

Q. Have you any such feeling in the matter that would make you have a preference for the death penalty rather than the
233 other?

A. No, sir.

Q. Have you ever been a police officer?

A. No.

Q. Ever have any connection with corporations in the prosecution of such matters?

A. Never have, no.

Q. Never have been interested in a case of that kind yourself?

A. No, sir.

Q. Do you know of any reason why you could not be a fair juror if you are chosen in this case?

A. No, sir.

Further Questions by Mr. Robertson:

Q. How far is your residence from Leavenworth, Mr. Dean?
A. It is 300 miles.

Mr. Robertson: That is all.

The Court: We will take a few minutes' recess now. Try to keep these gentlemen in the box so that they will not have to crowd around among the public—rather keep them together.

After a recess of a few minutes, the proceedings were resumed and the following were had:

The Court: Mr. Robertson, you accepted the last juror?
Mr. Robertson: Yes, sir.
The Court: Defendant's challenge again.
Mr. O'Donnell: Challenge Mr. Stewart.

Mr. S. B. Stewart was then excused upon defendant's peremptory challenge.

L. C. JONES, called as a juror, having been duly sworn, testified as follows, touching his qualifications to sit as a juror in this case.

Questions by Mr. Robertson:

Q. Where do you live, Mr. Jones?
A. Ottawa, Kansas.
Q. What is your business?
A. Clothing business, retail.
234 Q. How long have you lived at Ottawa?
A. 41 years.
Q. Have you heard anything about the facts of this case?
A. Nothing only what I have heard in this court room.
Q. Have you any opinion as to the guilt or innocence of the defendant?
A. No, sir.
Q. Have you a feeling of prejudice against capital punishment in murder cases?
A. Yes, sir.
Q. Have you such a feeling that would prevent your voting for the death penalty in such a case?
A. Yes, sir.

Mr. Robertson: We challenge Mr. Jones.
The Court: Stand aside.

And to the action of the court, and ruling, in sustaining the challenge of the prosecution to Mr. L. C. Jones, as a juror, defendant then and there duly excepted and still excepts.

E. L. FINEGAN, called as a juror, having been duly sworn, testified as follows touching his qualifications to sit as a juror in this case:

Questions by Mr. Robertson:

Q. Where do you live?
A. St. Francis, Cheyenne county.
Q. How far from Leavenworth?
A. 250 miles, around that.
Q. Have you heard the *pru*ported facts in this case?
A. No more than I have heard in the court room.
Q. Have you an opinion as to the guilt or innocence of the defendant? Do you entertain an opinion now, without stating what it is?
A. Well, I have a slight opinion, yes, sir.
Q. Have you such an opinion as would prevent you from trying this case fairly on the law and the evidence that you received here in the court room?
A. No, sir.
Q. Have you a feeling of prejudice against capital punishment?
A. No, sir.
235 Q. Would you vote for a verdict that meant capital punishment just as readily as any other verdict if the facts and law justified it?
A. Yes sir.
Q. Are you in that frame of mind that you can exercise your judgment freely and unhampered in selecting the sort of verdict that ought to be rendered, if you are selected as a juror in this case?
A. Yes sir.
Q. You have no favoritism for any certain verdict, as I understand you?
A. No sir.
Q. You have heard the examinations of the other men sitting in the jury box there, have you?
A. Yes sir.
Q. Does anything you have heard in that connection make you feel you would not make a fair and impartial juror, Mr. Finnegan?
A. No sir.
Q. What is your business?
A. Wholesale and retail seed business.
Q. Do you know of any reason at all why you ought not to be chosen as a juror here?
A. No sir.

Questions by Mr. O'Donnell:

Q. What is your full name?
A. E. L. Finnegan.
Q. What is your first name?
A. E. L.—Ed.
Q. Edward, is it?

A. Yes sir.
Q. Are you a married man, Mr. Finnegan?
A. No sir.
Q. You said, Mr. Finnegan, you didn't know anything about this case, except what you heard in this court room—when did you first hear it in this court room?
A. I was here a month ago.
Q. At that time you heard some statements made by Mr. Robertson, about the case?
A. Yes sir.
Q. And by Mr. Robertson's stenographer, Mr. Stickney, reading the affidavit of Mr. Robertson?
A. I don't remember much about the affidavit.
236 Q. Didn't you hear Mr. Robertson's statement about the case?
A. Yes sir.
Q. And you heard his honor make some remarks in the case?
A. Yes sir.
Q. He made some remarks about the counsel in the case?
A. He didn't have much counsel at that time.
Q. You heard the remarks whatever they were?
A. Yes sir.
Q. And what you heard at that time and today is all you have heard about the case?
A. Yes sir.
Q. Now, Mr. Finnegan, what you heard necessarily created some opinion in your mind about the guilt or innocence of the defendant?
A. Well, the slightest bit, yes sir.
Q. That is to say, after having heard what transpired about this case, you had an opinion that would require evidence to remove?
A. Yes.
Q. What you heard in the court room on the 23rd of May caused you to have an opinion concerning the guilt or innocence of this defendant of such a character that it would require evidence to remove, Mr. Finnegan—that is what you have just said?
A. Well, a slight opinion—nothing very much.
Q. Whether that is slight or otherwise, it is of such character that it would require evidence to remove it?
A. Well, I don't know that it would require evidence particularly to remove it.
Q. Well, I will put it this way: what you did hear, Mr. Finnegan, caused you to have an opinion about the facts in the case, whether it was slight or intense?
A. Yes sir.
Q. And that opinion, whether slight or intense, was a fixed opinion that would require evidence to remove?
A. Well, I presume my opinion would be based finally upon the evidence, yes.
Q. Sir?

A. I presume my opinion would be based finally upon the
237 evidence, yes sir.

Q. That is, this opinion that you have would require evidence to remove it?

A. Yes.

Q. Did you say yes?

A. Yes sir.

Q. And your present state of mind is such that you would have to hear evidence in order to change that opinion?

A. Yes.

Q. Did you say yes?

A. Yes.

Q. Are you acquainted with Mr. Robertson, the district attorney?

A. Yes sir.

Q. How long have you known him?

A. About 15 years, I guess.

Q. What has been the nature of your acquaintance with him?

A. The acquaintance has been very agreeable, so far as I know.

Q. Ever had any business relations with him?

A. No sir.

Q. He has never been your counsel?

A. No sir.

Q. Mr. Finnegan, you understand that in cases of murder in the first degree, the law authorizes the jury to assess the punishment, the judge has nothing to do with that part of it until the jury first gets a whack at it?

A. Yes sir.

Q. The law passes it up to you men there, whether the man shall be hung or go to the penitentiary for life. Have you any predelection in favor of one of those punishments?

A. No sir, I have not.

Q. You would hang a man as readily as give him life imprisonment?

A. I would, yes sir.

Q. And it would depend upon your mood, in case you found him guilty—just how you might feel?

A. No, that would depend upon what the evidence in the case was.

Q. Well, suppose it was murder in the first degree, what would your verdict be, suppose you found him *b*uilty of murder in the
first degree, what would you assess the punishment at, as you
238 now feel about it?

A. Well, I don't know. I could not say how I would.

Q. Have you got any prejudice against sending a defendant found guilty of that crime to prison for life?

A. No sir.

Q. Would you do that just as readily as the other?

A. Yes.

Mr. O'Donnell: We challenge the juror for cause.

Questions by the Court:

Q. Mr. Finnegan, you say that what you have heard about this case has caused you to have an opinion?
A. Well, I could have a slight opinion, I have no fixed opinion.
Q. Have you ever heard anybody say anything about the facts in connection with the killing, as claimed, of this guard?
A. No sir, I have not.
Q. Was there anything said about the facts in the case in your presence here or anywhere else?
A. No sir.
Q. Then on what do you base that opinion?
A. Well, of course I have read some accounts about it.
Q. You base such opinion on what you have read or heard about it, as to the guilt or innocence of the defendant?
A. When I read the account, I took it for granted it was the fact.
Q. And have you an opinion now, as to his guilt or innocence?
A. I guess I have an opinion.

The Court: Do you challenge him?
Mr. O'Donnell: Yes, we challenge him, your honor, for cause.
The Court: Let us see how many jurors we have here. I am satisfied he — as qualified as any juror you will get. Let us see how many jurors we have got here. I don't know whether we
239 can get the balance of the jurors out of those here or not; if we cannot, we will send out and get them; if it takes all summer, we are going to try this case. (To the Marshall:) How many jurors are out there that have not been called?
The Marshall: There are about fifteen.
The Court: Call another juror. You are excused, Mr. Finnegan.

CHARLES BRADSHAW, called as a juror, having been duly sworn, testified as follows, touching his qualifications to sit as a juror in this case:

Questions by Mr. Robertson:

Q. Where do you live, Mr. Bradshaw?
A. At Herington.
Q. How far from Leavenworth?
A. I believe it is about 144 miles.
Q. What is your business?
A. Real estate business.
Q. Have you heard about this case more than what has occurred in the court room?
A. No.
Q. Have you any opinion as to the guilt or innocence of the defendant?
A. None whatever.
Q. Have you any consciencious scruples against the administration of the death penalty

A. I don't think I would vote to hang a man under any circumstances.

Q. You would not vote for a verdict that meant death, under any circumstances?

A. No sir.

Mr. Robertson: Challenge Mr. Bradshaw.

The Court: Stand aside.

Mr. O'Donnell: We accept to the action and ruling of the court in excusing Mr. Bradshaw.

And to this ruling and action of the court defendant still excepts.

240 J. L. RANDALL, called as a juror, having been duly sworn, testified as follows touching his qualifications to sit as a juror in this case:

Questions by Mr. Robertson:

Q. Where do you live, Mr. Randall?

A. Clyde, Cloud county, Kansas.

Q. What is your business?

A. Book-keeper for flour mill.

Q. Book-keeper for whom?

A. A flour mill.

Q. Have you heard anything about this case?

A. I read a short account of it in the papers and heard what was talked here a month ago.

Q. Have you received enough about it so that you now have an opinion as to the guilt or innocence of the defendant?

A. No sir.

Q. Have you a feeling of prejudice against the administration of capital punishment?

A. No sir, but rather from what I have read and heard about it, I am rather in favor of capital punishment in this case.

Q. You are not?

A. I am.

Q. Now, if you are chosen as a juror here, will you be controlled by what you have read and heard or what you get here in the court room, from the witness chair?

A. What I *got* in the court room.

Q. I take it from the remark that you have heard a little about it in the past?

A. Yes sir.

Q. Now, whatever you have heard and thought about it in the past, do you think you are in position to disregard what you have heard and thought about it?

A. I do.

Q. Will you do that if you are a juror in this case?

A. Yes sir.

Q. Do you know anybody interested in the case, Mr. Ran-
241 dall?

A. No sir.
Q. Are you a married man?
A. I am.
Q. How many children have you?
A. Two—one ten and one six.
Q. Boys or girls?
A. Both girls.
Q. How long have you lived at Clyde?
A. About twenty years.
Q. What county do you live in?
A. Cloud county.

Mr. Robertson: That is all.
Mr. O'Donnell: We challenge Mr. Randall for cause.
The Court: I understood the juror to say that he had no opinion as to the guilt or innocence of the defendant?
Mr. O'Donnell: He made a subsequent answer that indicated that he had.
Mr. Robertson: An opinion as to the character of punishment that ought to be meted out provided the facts were as he had heard.

Questions by the Court:

Q. What did you mean by that?
A. I meant to say that I had no opinion as to the guilt or innocence, but if the facts as I understood them are bourn- out by the evidence, I was——
Q. If the facts as you understood them are bourn- out by the evidence, then you have an opinion?
A. Yes sir.
Q. Is that all you meant to say a while ago?
A. Yes, sir—just what I meant to say.
Q. Well, does your understanding of the facts as you have heretofore read them, cause you now to have an opinion as to the guilt or innocence of this man?
A. No sir.
Q. Have you ever formed or expressed any opinion as to his guilt or innocence?
A. No sir.
Q. Can you try this case and render a verdict on the evi-
242 dence you hear from the witness stand, unaffected by anything you have heretofore read?
A. Yes sir.
Q. Is there anything in your mind now either in favor of or against the defendant that would require evidence to remove; before you would be in a position to give the defendant and the government both a fair trial?
A. No sir, I believe not.

Mr. Robertson: May I ask him a further question?

Questions by Mr. Robertson:

Q. Do you feel that you are in that frame of mind that you could go on here and try the case fairly and render a fair, unbiased verdict?

A. Yes sir, I believe I can.

Q. Do you feel, Mr. Randall, that because the defendant is brought here charged with this crime that would prejudice you against him in considering the evidence in this case?

A. No sir.

Q. Do you understand that it would be your duty to find the defendant guilty beyond a reasonable doubt, before he is adjudged guilty?

A. Yes sir.

Q. Do you understand that to be the rule of law in this case?

A. Yes sir.

The Court (to Mr. O'Donnell): You may inquire.

Questions by Mr. O'Donnell:

Q. Mr. Randall, you say you are a book-keeper?

A. Yes sir.

Q. What city are you from—I didn't get it?

A. Clyde, Cloud county.

Q. How far is that west of here?

A. About 160 miles from here, I would say.

Q. Is it south or west?

A. It is 140 miles almost straight west of Atchison.

Q. Mr. Randall, you have never heard about this case,
243 until the 23rd of last May, as I understand?

A. Yes sir.

Q. You were then in this court room?

A. Yes sir.

Q. At that time you heard Mr. Robertson talking something about this case?

A. Yes sir.

Q. And you also heard his honor on the bench, Judge Lewis, talk about the case?

A. Yes sir.

Q. And that was all that you had heard about the case until today?

A. Yes sir, except what I had read in the papers in the meantime, a short article.

Q. And, Mr. Randall, I will ask you, if it was not upon what you heard on the 23rd of May in this court room, during the absence of defendant's counsel, that you based your opinion that you are in favor of capital punishment in this case?

A. No sir, it was on what I had read in the mean time.

Q. What papers did you read it in?

A. I think I read it in one of the Topeka dailies—I can not be positive where.

Q. About how long ago, Mr. Randall?
A. About two or three weeks ago.
Q. And that paper recited the occurrence over at the penitentiary for which this defendant is being tried?
A. And that which preceded it.
Q. And from all that you have heard in this court room, and what you have read in the newspapers, you formed that opinion that you were in favor of capital punishment?

The Court: He says, no.

A. It was what I read in the newspaper. There was nothing said in the court room that made my opinion.
Q. Did you hear what was said?
A. Yes sir.
Q. You formed your opinion from what you saw in the newspapers alone?
A. Yes sir.

Q. And it was what you saw in the newspapers that caused
244 you to make the statement that I have just quoted, to Mr. Robertson?

A. Yes sir.
Q. So that your opinion, however you gathered it, would have to be overcome by the evidence, and that would depend upon how strong the evidence was?
A. Yes, sir.
Q. Mr. Randall, the defendant and the government are entitled to have jurors whose minds are white and clean and free from prejudice, to try this case,—now, while you say that you have a fixed opinion gathered from the newspapers which will require evidence to remove, as I understand it—that is what you stated?
A. I didn't mean to say that I had a fixed opinion as to his guilt or innocence, but a fixed opinion as to the penalty I thought it would be just to impose if he was proven guilty.
Q. That is to say, you would not give him the benefit of the presumption of innocence at all unless evidence was put in at this time?
A. That is what I meant to say, yes, sir.

The Court: What is that, he said?
Mr. O'Donnell: He said he would not give the defendant the benefit of the presumption of innocence unless evidence was put in. We challenge the juror for cause.
The Court: Mr. Randall, you may be excused.

C. C. McCammon, called as a juror, having been duly sworn, testified as follows, touching his qualifications as a juror:

Questions by Mr. Robertson:

Q. Where do you live, Mr. McCammon?
A. Jewell county.
Q. What is your business?

A. Farmer.
Q. How long have you lived in Jewell county?
A. I was born there.
Q. What is your town?
A. Mankato.
Q. That has always been your post office?
245 A. No, Esbon used to be.
Q. Have you heard anything about the purported facts of this case?
A. No, sir—just what I have heard in the court room here.
Q. Have you learned enough so you have an opinion as to the guilt or innocence of the defendant?
A. No, sir, never have heard the facts.
Q. Have you any prejudice against the application of the death penalty in murder cases?
A. Yes, sir.
Q. You have a feeling of prejudice in such a case?
A. Yes.
Q. Is that feeling such that you could not vote for a verdict that meant the death penalty?
A. I don't think I could.

Mr. Robertson: We challenge for cause.
The Court: You are excused.
Mr. O'Donnell: We except to the action of the court in excusing Mr. McCammon.

And to this action of the court defendant still excepts.

FRED LAYTON, called as a juror, having been duly sworn, testified as follows touching his qualifications to sit as a juror in this case:

Questions by Mr. Robertson:

Q. You live at Jamestown?
A. Yes, sir.
Q. How far from Leavenworth?
A. About 190 miles.
Q. What is your business?
A. Farmer.
Q. How long have you lived there?
A. 36 years—all my life.
Q. You were born there?
A. Yes, sir.
Q. Are you a married man?
A. I am.
Q. A farm owner?
A. Yes, sir.
Q. Have you heard about the facts in this case?
A. I have heard it stated here in the court room.

246 Q. Have you heard enough so that you now have an opinion as to the guilt or innocence of the defendant?

A. I have not.

Q. Have you any prejudice against capital punishment?

A. I believe in capital punishment in certain cases.

Q. In a case of cold blooded, maliciously planned premeditated murder, would you feel a prejudice against capital punishment?

A. In cold blooded, premeditated murder, I would not feel prejudice against capital punishment.

Q. You understand that, under the law of the United States, the jury has the power to limit its verdict to imprisonment for life?

A. Yes, sir.

Q. Are you in position that you could consider freely upon those two verdicts?

A. I believe I could, yes, sir.

Q. You would do that if you were a juror?

A. Yes, sir.

Q. Have you been a juror before?

A. Yes, sir.

Q. In the Federal court?

A. Yes, sir.

Q. When was that?

A. In Topeka, two years ago: I was called for a juror but there were no jury cases.

Q. Do you remember what month?

A. I believe it was the 25th of October, we had the court.

Q. November, it must have been?

A. November, I believe it was; at the time we had Mr. Brady as Assistant.

Q. Do you know of any reason why you should not be chosen as a juror here, Mr. Layton?

A. No, sir.

Q. Do you think you could do what is fair and right, if you are a juror here?

A. I believe I could, yes.

Q. And try the case on what you got here in the court room?

A. I believe I could, yes, sir.

Q. You understand in cases of this kind that the facts are to be taken from the witnesses upon the stand, and the law comes from the court, do you?

A. Yes, sir.

247 Q. That our own will and opinions do not go—do you understand that?

A. Yes, sir.

Mr. Robertson: That is all.

Questions by Mr. Andres:

Q. Mr. Layton, Jamestown is in Cloud county?

A. Yes, sir.

Q. Are you acquainted with Mr. Robertson?
A. I am not.
Q. Or with Mr. Harvey?
A. No, sir.
Q. You understand, do you, that under the law, you have a choice, if the jury should convict Mr. Stroud here of murder in the first degree, as to whether you would give him life imprisonment in the Federal penitentiary, or you have the power to recommend that penalty, and the court would have to inflict that penalty?
A. Yes, sir.
Q. Now you don't have any prejudice in favor of inflicting the death penalty?
A. Only as I said before, when murder is cold blooded and premeditated, I am for capital punishment, if it is proven; otherwise I am not.
Q. But if there is some excuse—even though the man may make a mistake in going too far in killing a man?
A. No, I don't.
Q. Did you ever try a man for murder?
A. No, sir.
Q. Never was on the jury?
A. No, sir, not in a criminal case.
Q. You don't know any reason now why you cannot try this case fairly and impartially and render a verdict according to the law and the evidence, what you hear in the court room?
A. No, sir.
Q. You have, of course, read about this case?
A. If I read about it I have forgotten it.
Q. You are a man of family?
A. Yes, sir.
Q. Have you any boys, Mr. Layton?
A. Two, one five and one eleven years old.

Mr. Andres: Pass the juror.

248 Mr. O'Keefe: The third gentleman from the corner, what is the name, please?
Mr. McGregor (a juryman): McGregor.
Mr. O'Keefe: The defendant excuses Mr. C. J. McGregor.

ELMER E. MANLEY, called as a juror, having been duly sworn, testified touching his qualifications to sit as a juror in this case, as follows:

Questions by Mr. Robertson:

Q. Where do you live, Mr. Manley?
A. Ottawa, Kansas.
Q. What is your business?
A. Shoe business, retail.
Q. How long have you lived in Kansas?
A. 44 years.

Q. How far is your residence from Leavenworth?
A. 72 miles.
Q. Have you heard the purported facts in this case?
A. As I have heard them here, yes sir.
Q. Have you heard enough so that you now have an opinion as to the guilt or innocence of the defendant?
A. I have not formed any opinion, no sir.
Q. Have you a feeling of opposition to capital punishment?
A. I know of no circumstances that would justify me in taking another man's life—I would sign a verdict——
Q. The question is, have you a fixed prejudice against the administration of capital punishment?
A. I have, yes sir.

Mr. Robertson: Challenge Mr. Manley.
The Court: Stand aside, sir.
Mr. O'Donnell: We except to the action of the court in excusing Mr. Manley.

And to this action of the court, defendant still excepts.

M. A. FOREST, called as a juror, having been duly sworn, testified touching his qualifications to sit as a juror in this — as follows:

249 Questions by Mr. Robertson:

Q. You live at Troy, Mr. Forest?
A. Yes.
Q. What is your business?
A. Farmer.
Q. You have lived how long in Doniphan county?
A. All my life.
Q. How far do you live from Leavenworth?
A. Oh, I think about 40 miles.
Q. Are you acquainted with the facts of this case?
A. Well, newspaper accounts.
Q. Have you had enough information so that you now have an opinion as to the guilt or innocence of the defendant?
A. I think I have—I believe I have.
Q. Is that opinion such that it would affect your verdict if you were chosen here and allowed to go on and sit in the case?
A. Well, I don't know, hardly.
Q. Could you go on and try the case on what you get here in the court room and disregard such opinion as you heretofore have had and now have?
A. I suppose I could.
Q. Let me ask you if you cannot say definitely whether you could do that or not?
A. I heard something about the case before I ever was called down here, and I read it in the Kansas City papers.
Q. Have you got your mind made up now how it ought to be decided?

A. I am afraid I have.
Q. And you would have to hear evidence before you could change that?
A. Yes sir.

Mr. Robertson: If the other counsel want to try to qualify him, I am willing to give them a chance.
Mr. O'Donnell: We challenge him, that is, for cause.

250 The Court: You may be excused.

EDWARD F. HEIM, called as a juror, having been duly sworn, testified touching his qualifications to sit as a juror in this case, as follows:

Questions by Mr. Robertson:

Q. Where do you live, Mr. Heim?
A. Kansas City.
Q. Kansas City, Kansas?
A. Yes sir.
Q. What is your business?
A. Ice business.
Q. Have you heard the purported facts in this case?
A. No; I have read about it some.
Q. Have you an opinion now as to the guilt or innocence of the defendant?
A. No, I don't think so.
Q. How long have you lived in Kansas City?
A. 30 years.
Q. Are you opposed to the administration of capital punishment?
A. I am.
Q. Are you so opposed to it that you would not vote for a verdict that would mean death to the defendant?
A. I don't believe I could.
Q. You could not?
A. I don't believe I could.

Mr. Robertson: We challenge Mr. Heim.
The Court: You are excused.
Mr. O'Donnell: The defendant excepts to the action of the court in excusing Mr. Heim.

And to this action of the court defendant still excepts.

F. S. CHRISTIAN, called as a juror, having been duly sworn, testified touching his qualifications to sit as a juror in this case, as follows:

Questions by Mr. Robertson:

Q. Where do you live, Mr. Christian?
A. Atchison.
Q. What is your business?

A. Why, I am working on the water-works now.
251 Q. In the city of Atchison?
A. Yes sir.
Q. How long have you lived at Atchison?
A. Oh, about 34 years.
Q. Have you heard anything about this case?
A. Why, I read of it I guess at the time, and I *b*orgot all about it until I was called here, and it refreshed my mind about it. I read of it.
Q. Have you got an opinion now as to the guilt or innoceence of the defendant?
A. No sir.
Q. Do you have a feeling of opposition to the death penalty?
A. Well, if the evidence justified it, I would vote for it.
Q. If you are chosen as a juror here now, and you would ultimately determine this defendant guilty of first degree murder, you would have an opportunity to determine upon whether the verdict should mean life imprisonment or death for him. Do you now know which verdict you would vote for, under those circumstances?
A. I don't just exactly understand you.
Q. Well, you have heard the discussion here, that has gone on here, about this matter, to day, haven't you?
A. Yes sir.
Q. And you have heard the examinations about it to the other eleven gentlemen besides yourself that are sitting in the jury box?
A. Yes sir.
Q. You understand that in cases of first degree murder there are two sorts of verdict that the jury can vote on, one meaning life imprisonment, the other meaning death?
A. Yes sir.
Q. Now, then, have you now got a fixed preference for one form or the other of those verdicts?
A. Well, I could not say that I have, no. If the evidence justified it, I would render a verdict to hang.
Q. Yes—well, now, if——

The Court: I think he has answered that sufficiently.
252 Mr. Robertson: I expect he has, your Honor.

Q. Do you know of any reason at all why you would not make a fair juror here?
A. No sir, *O* don't.
Q. Are you a man of family?
A. Yes.
Q. How large a family have you?
A. A wife and one(?) chill—they are all grown.
Q. I would like to ask you a question—how long have you lived in Atchison county?
A. With the exception of about 13 months, I will have lived there 34 years, I went there in Augus, 1884.
Q. Have you been on juries before?

A. Yes sir; never only on District jury.
Q. In the district court of Atchison county?
A. Yes sir.

Questions by Mr. O'Donnell:

Q. Mr. Christian, it is my understanding, you stated that you read something concerning the facts in this case?
A. Sir.
Q. You read something about this case, in the newspapers?
A. Yes sir. After my memory was jogged by hearing about it. I forgot all about it until I came here as a juror; then I heard the case mentioned here, and I suppose it is the same case—I am clear that it is.
Q. Were you here in the court room last May as a juror, or prospective juror?
A. Yes sir, I was called here in May.
Q. Did you then hear Mr. Robertson talk about the case?
A. No, I think not; I was called on the second call, as talesman here.
Q. So that you were not present when Mr. Robertson was talking about it?
A. No sir.
Q. State whether or not from what you read in the newspapers you formed an opinion?
A. I never did; I had forgotten about the case until I came here.
253 Q. You understand, Mr. Christian, that in this case the evidence may be such that you will find the defendant not guilty, or guilty of other degrees of killing, but you stated you would render a verdict to hang under certain circumstances—what circumstances did you have in mind?
A. I said, if the evidence justified it, I would.
Q. Well, the law is that no matter what the evidence may be, no matter what kind of murder in the first degree it is, that the juror has an option not to hang, that he don't have to hang a man unless he wants to, and that he can if he so desires sentence him to imprisonment for life. Now, are you in favor of hanging rather than imprisonment for life?
A. I could not say that I am, no sir.
Q. That is, you would not care to hang a man unless you had to?
A. No sir.

By Mr. Robertson:)

Q. You say, you would not care to hang a man unless you had to?
A. No sir.

(By Mr. Robertson)

Q. You would not care to render a verdict that meant death?
A. Not unless the evidence justified it I would not.

The Court: Do you accept this juror?
Mr. Robertson: No, I believe I would excuse him.
The Court: You are excused.

J. W. BRET, called as a juror, having been duly sworn, testified touching his qualifications to sit as a juror in this case, as follows:

Questions by Mr. Robertson:

Q. Where do you live, Mr. Bret?
A. I live in Jefferson county.
Q. What is your business?
A. Farming.
254 Q. Have you heard the purported facts in this case?
A. Only what I have heard at this court house.
Q. Have you heard enough so that you have an opinion as to the guilt or innocence of the defendant?
A. No sir.
Q. Have you a feeling of opposition or prejudice against capital punishment?
A. No sir, not especially. Of course, I never believed very strongly in capital punishment—never believed very strongly in it, but still I am not prejudiced against it.
Q. Well, have you expressed yourself as opposed to it in the past?
A. I don't know hardly whether I have or not; it may be that I have and it may be that I have not.
Q. Do you belong to any organization the principles of which are opposed to capital punishment?
A. No sir.
Q. Do you think, in the case of a perfectly plain, premeditated murder——

The Court: I think the juror has said all he can say on that; he is not opposed to capital punishment.
Mr. Robertson: I rather got the idea from his talk that he has some mental reservation about it.

Q. What I want to get at, Mr. Bret, is whether you are free to exercise your judgment whether the verdict shall be imprisonment for life or capital punishment?
A. I think I am, as far as I know, I am free to do it; yes sir.
Q. You think, as far as that is concerned, you could render a verdict upon the evidence as measured by the law? Is that the idea?
A. Yes sir.
Q. You would do that?
A. That would be my intention—yes sir.

255 Questions by Mr. Kimbrell:

Q. The evidence in this case, as I understand it, is that Mr. Turner, who was killed, was a guard in the penitentiary, in authority

over the defendant, who was a prisoner, and that the guard undertook, with his club, to inflict some punishment in anger upon the defendant, and the defendant scuffled with the club for a while and afterwards stabbed him. His defense is self defense. Would the fact that he was a prisoner or convict and that the man he killed was in authority over him, prejudice you in considering the evidence which tended to show his right of self defense or self defense?

A. Well, I hardly could say it would prejudice him. It might have some weight in the matter.

Q. Do you mean that you feel because a man is a convict under the man that is killed, that he has not the same right to defend his own person from bodily harm that he would have if he was not a convict—do you feel that way?

A. He would have the same right as if he was not a convict; I would not think that he didn't have.

Q. Have you ever served in your county as sheriff?

A. No sir.

Q. Or peace officer of any kind?

A. No sir.

Q. And know nothing about this case?

A. No sir.

Q. Are you personally acquainted with Mr. Robertson, or his assistants who represent the government in this case?

A. No sir; I never saw him until in this court house.

Q. Have you ever been interested in the prosecution of a murder case?

A. No sir.

Q. Either as a witness, or because some relative or person near to you had been killed?

A. No sir.

Q. Do you know of any reason why you could not fairly determine this case from the evidence given from the witness
256 stand and from the instructions of the court?

A. No, I do not, really.

Mr. Kimbrell: That is all.

The Court: Mr. Robertson, do you challenge the juror?

Mr. Robertson: We accept the juror.

The Court: It is defendant's challenge.

The defendant here excused Mr. Ben Talbott, by peremptory challenge.

JAMES NELSON, called as a juror, having been duly sworn, testified touching his qualifications to sit as a juror in this case, as follows:

Questions by Mr. Robertson:

Q. Where do you live, Mr. Nelson?

A. In Waterville, Kansas.

Q. What is your business?

A. Retired farmer. I am farming some now—not personally; I conduct farms.

Q. You rent your land out do you?

A. Yes; then I help farm, part of the time.

Q. Have you heard anything about the facts in this case?

A. Not any more than I heard in the court room.

Q. Have you any opinion now as to the guilt or innocence of the defendant?

A. No sir.

Q. Are you opposed to the death penalty in murder cases?

A. No sir.

Q. You have heard the examination of the other gentlemen here?

A. Yes sir.

Q. Do you think you are perfectly free to render a fair verdict in this case, if you are chosen?

A. According to the evidence, yes sir.

Q. According to the law and the evidence—have you any
257 feeling of bias or prejudice upon these different forms of verdict you have heard talked about?

A. No sir.

Q. You think you are perfectly free to exercise an honest judgment upon that, do you?

A. Yes sir.

Questions by Mr. O'Keefe:

Q. What is your full name?

A. James H. Nelson.

Q. What is the last name?

—. Nelson.

Q. You live where, Mr. Nelson?

A. Waterville.

Q. How long have you lived at Waterville?

A. Seven years.

Q. Where were you born?

A. Denmark.

Q. Are you an American citizen?

A. For 42 years.

Q. Now, you say you know nothing about the facts in this case?

A. No sir.

Q. You never heard of it at all?

A. No sir, not outside of this court room.

Q. When did you first hear of it in the court room?

A. The first time I was down here about a month ago.

Q. After hearing of it in the court room a month ago, have you paid any attention to the facts in this case?

A. No sir.

Q. You didn't read of it at all?

A. Not that I know of, no.

Q. Now, from what you heard in the court room, have you formed any opinion as to whether this man was guilty or innocent?

A. In my opinion there was nothing here to prove he was guilty or innocent.

Q. Only some talk here, that is all you heard?

A. Only what was said here in the court room.

Q. You paid no attention to that?

A. Not as to his guilt or innocence.

Q. Are you in favor of the death penalty in murder cases?

A. If the judge instructs and the evidence requires it, I am.

Q. If you had your option about it?

A. It depends all on the evidence.

258 Q. You say you have how many children?

A. Four.

Q. How old is the oldest one?

A. 40 years.

Q. How old are you now?

A. 63.

Q. What newspapers do you read, Mr. Nelson?

A. The Kansas City Star and Times, and the Plattsburg paper.

Q. Now, in the Kansas City Times, and Star, you don't remember reading anything about this case?

A. I may have read it at the time, but I don't remember. I have been so busy and since I have been here I have not seen anything.

Q. Do you know of any reason, Mr. Nelson, why you could not try this case according to the law and the evidence?

A. I don't know of any reason why I could not; I would rather be excused and get the wheat in.

Q. If it transpired that this man acted in self-defense, in defense of his life—and the evidence justified you in so believing or you had a reasonable doubt about it, and the court instructed you that if you had a reasonable doubt, you should acquit him, would you hesitate to do it?

A. Not if the court instructs me to do so.

Q. You would give the defendant in the case the benefit of a reasonable doubt, would you?

A. Yes, sir.

Mr. O'Keefe: That is all.

The defendant then excused Mr. E. S. Dean, by peremptory challenge.

M. D. Eglin, called as a juror, having duly affirmed, testified as follows touching his qualifications to sit as a juror in this case:

Questions by Mr. Robertson:

Q. Where do you live, Mr. Eglin?

A. In Grown county.

Q. How far from Leavenworth?

A. Why, it is about 75 miles.

259 Q. Have you heard what the facts are in this case, or claimed to be, rather?

A. I have heard nothing only what I have heard here in the court room.

Q. Have you any opinion as to the guilt or innocence of the defendant?

A. I have not.

Q. Have you any feeling or prejudice against the taking of a human life as a penalty for the crime of murder?

A. I have not.

Q. You have no opposition to that?

A. No, sir.

Q. Have you heard the examinations that have been made of the gentlemen who are now sitting in the jury box?

A. Yes, sir.

Q. You have heard the discussion of these different forms of verdict?

A. I have.

Q. Do you feel that you would make an honest juror if you were chosen here?

A. I do.

Q. What is your business?

A. Farming.

Q. How long have you lived in Brown county?

A. About 52 years.

Questions by Mr. O'Keefe:

Q. Mr. Eglin, you say you have heard nothing of the facts in this case?

A. No, sir, only what I have heard here in the court room.

Q. Today?

A. I was here in May.

Q. After being here in May, did you talk to your fellow jurors about the case?

A. I did not.

Q. Did you read the newspapers afterwards?

A. I have never read anything about the case that I remember of.

Q. What papers do you take, Mr. Eglin?

A. I could not name all of them: the St. Joseph News Press, a Brown county daily—those are the two dailies that I take; I believe we have, too, the Stock Yard Journal.

260 Q. You do not take the Kansas City papers?

A. No, sir, not the daileys—the Sunday Journal.

Q. Have you heard the case spoken of in addition to what you heard here before?

A. No, sir.

Q. From what you heard, have you formed any opinion as to whether the man who was killed was unlawfully killed?

A. No, sir.

Q. Have you formed any opinion as to whether the defendant in this case was guilty or innocent?

A. No, sir.

Q. If it should appear from the evidence in the case, Mr. Eglin, that the defendant when he struck the blow in question struck it in self-defense, and the court instructed you that in such a case he should not be found guilty, you would follow the court's instructions?

A. I would endeavor to follow the court's instructions and the evidence.

Q. The mere fact that the defendant is a prisoner, would that of itself tend to make you lean towards the conviction of him?

A. No, sir.

Q. You think you would be absolutely fair with him, even though he was a prisoner at the time of this occurrence?

A. I would try to be, to the best of my ability.

Q. Are you acquainted with any of the gentlemen representing the United States?

A. I am not.

Q. Do you know any reason why you could not try this case fairly and impartially upon the evidence as given you by the court?

A. I do not.

Q. You will try to do so, if you are chosen as a juror here?

A. I will.

Q. Now, in regard to capital punishment, would you have any hesitancy in finding him, in bringing in a verdict of guilty and to hang, in case you believed him guilty of murder in the first degree?

A. No, sir.

261 Q. You would try to follow the court's instructions in the matter, would you?

A. Yes, sir.

Q. Suppose you believe from the evidence that the man was guilty of murder in the first degree, and you had your option of life imprisonment or of death, is death the only penalty you would consider, or would you be governed entirely by the evidence and the law as given by the instructions?

A. By the court's instructions.

Q. Suppose you believed from the evidence in this case that the man acted in self-defense in what he did, you would acquit him, would you?

A. I would, certainly.

Q. Suppose you had reasonable doubt, would you give him the benefit of the doubt?

A. According to the court's instructions, I would.

Mr. O'Keefe: That is all.

The Court (to Mr. Robertson): You accept the last two jurors?

Mr. Robertson: Yes, sir.

The Court: Defendant's challenge.

Mr. O'Keefe: The gentleman back here with glasses, what is your full name?

Mr. Postal: Claud Postal.
The Court: Defendant excuses Mr. Postal.

DICK HAYES, called as a juror, having been duly sworn, testified concerning his qualifications as a juror, to sit in this case, as follows:

Questions by Mr. Robertson:

Q. You live at Cottonwood Falls, Mr. Hayes?
A. Yes, sir.
Q. What is your business?
A. Farmer, but not actively engaged in farming at the present time.
262 Q. How long have you lived in that community?
A. 50 years.
Q. Have you heard anything about the facts in this case?
A. No, only what I heard in the court room.
Q. Have you heard enough so that you have an opinion as to the guilt or innocence of the defendant?
A. No, sir.
Q. Have you a feeling of opposition to capital punishment?
A. No, sir.
Q. If the facts and the law justify it, you feel that you could vote for the verdict of that kind do you?
A. Yes, sir.
Q. Do you carry any prejudice now, in favor of that kind of verdict?
A. No, sir.
Q. Do you know anybody that you see concerned in this case?
A. No, sir.
Q. Have you ever been a juror in the Federal Court before?
A. No, sir.
Q. Have you in your own county, in the District Court?
A. Yes, in civil cases.
Q. In civil cases only?
A. Yes, sir.
Q. You are willing to assume the obligation, I take it, of trying and deciding this case on what you get here in the court room, and on that alone?
A. Yes, sir.

Questions by Mr. O'Donnell:

Q. Mr. Hayes, are you acquainted with Mr. Morgan, the warden at the penitentiary?
A. No.
Q. Or with any of the officials of that institution?
A. No, sir.
Q. Or with Mr. Robertson, the gentleman who just addressed you?
A. No, sir.

Q. I believe you said the first you heard of this case was in this court room?

A. Yes, sir, about a month ago.

Q. You may state, Mr. Hayes whether what you heard
263 then made any impression upon your mind upon the case?

A. No, sir.

Q. You understand, Mr. Hayes, that if the evidence warrants it, it is your duty to acquit the defendant unless the government proves beyond a reasonable doubt that he killed the man they charge him with having killed and unless all the elements of the crime they charge are proven—now then, in the event that the evidence might warrant it, you would decide his punishment, and if the defendant is found guilty of murder in the first degree, what punishment would you attach to that?

A. It would be owing to the instructions of the court and the evidence.

Q. You have an absolute right, under the instructions of the court, to decide that. The court would not undertake to control the action of the jury on it. That is left entirely to the decision of the jury; you have an opportunity to render a verdict either the one way or the other, if the evidence in the case warrants that kind of a verdict—now which would you be in favor of?

A. I would abide by the evidence.

Q. Which punishment would you be in favor of?

Mr. Robertson: I believe he has fairly answered that, your honor?

Mr. O'Donnell: I believe that is correct: I won't press it.

Q. As I understand, you, then, you have no desire to hang a man or put him in the penitentiary either one?

A. No sir.

Q. And you don't want to hang a man unless you have to?

A. No sir.

Mr. O'Donnell: That is all.

The Court: Mr. Robertson, do you accept the juror?
264 Mr. Robertson: Yes.

The Court: Defendant's challenge.

And thereupon the defendant excused Mr. M. D. Eglin under peremptory challege.

H. D. KENT, called as a juror, having been duly sworn, testified as to his qualifications to sit as a juror in this case as follows:

Questions by Mr. Robertson:

Q. Where do you live, Mr. Kent?

A. Troy, Kansas.

Q. What is your business?

A. I have been in the lumber business; I am not in business right now at all.

Q. Have you heard the purported facts in this case?

A. Yes sir.
Q. Have you heard enough so that you have an opinion as to the guilt or innocence of the defendant?
A. No sir.
Q. Are you opposed to capital punishment in murder cases?
A. I would be if the evidence would be clear, the evidence would alter the case.
Q. Is it your idea that the death penalty is to- severe, if it be clearly established that the defendant is guilty of cruel, premeditated, cold blooded, malicious murder?
A. Yes sir.
Q. You still think that the penalty would be too severe, do you?

(No answer.)

Q. You no doubt appreciate from what has already been said and what you have already heard that in cases of first degree murder there are two different forms of verdict that you have to deal with?
A. Yes.
Q. Have you any preference between the two?
A. No sir, none.
Q. Are you free to exercise your judgment freely and
265 conscientiously?
A. Yes sir.
Q. Will you do that if you are chosen as a juror?
A. Yes sir.

Mr. Robertson: Pass the juror.

Questions by Mr. O'Donnell:

Q. What is your business?
A. *Are you* in the lumber business, but I sold out about a year ago, and I have no business.
Q. Where do you live?
A. Troy, Kansas.
Q. Over here in Doniphan county?
A. Yes sir.
Q. Where the Bruce come from?
A. Yes sir, where the good people come from.
Q. Are you acquainted with Mr. Robertson?
A. I have met the gentleman—am not personally acquainted with him, no.
Q. Or with Mr. Harvey, his assistant?
A. No sir.
Q. Or with Mr. Malott?
A. No sir.
Q. Or with Mr. Morgan?
A. No sir.
Q. Or any of the officials of this institution?
A. I met Mr. Morgan once, and Mr. Robertson once or twice.
Q. Mr. Kent, you know that in cases of this kind, in the event

you should ever come to the matter of assessing the punishment of murder in the first degree,—it is possible you may never get to that question—but in the event you should, you would have an option to sentence him to death or sentence him to life imprisonment—how would you exercise that option?

A. Well, I could hardly figure on that—the evidence would make a difference.

Q. That is, you would consider the evidence in reaching that question?

A. Yes sir.

Q. You understand it would all be a matter for the jurors themselves, the court would not control your decision?

A. No sir.

Q. But you would not want to hang a man unless you
266 had to?

A. No sir.

Mr. O'Donnell: That is all.

The Court: Do you accept the juror, Mr. Robertson?

Mr. Robertson: Yes sir.

The Court: The defendant will challenge.

Mr. O'Donnell: We will excuse Mr Nelson.

James Nelson was then excused by the Court upon defendant's peremptory challenge.

D. E. HARPSBERGER, called as a juror, having been duly sworn, testified as follows touching his qualifications to sit as a juror in this case:

Questions by Mr. Robertson:

Q. You live at Manhattan, Mr. Harpsberger?

A. Yes sir.

Q. What is your business?

A. Retired farmer.

Q. How long have you lived in Riley county?

A. 36 years.

Q. How far do you live from Leavenworth?

A. About 114 miles.

Q. Have you heard anything of the facts in this case?

A. No sir.

Q. Have you a feeling of prejudice against the infliction of the death penalty in murder cases?

A. I don't know what the question is.

Q. That is, do you have any objection to it?

A. No sir.

Q. Is your mind in that state that you are free to vote for that sort of verdict, if the facts and instructions justify it?

A. It is.

Q. Do you know of any reason at all why you should not sit as a juror here?

A. No sir.

Q. Do you know anybody that you see interested in this case, as counsel or otherwise?

A. No sir.

Q. Have you heard anything about the case at all?

267 A. Only what I read of the occurrence at the time.

Q. But not enough so that you have any opinion as to the guilt or innocence of the defendant?

A. No sir.

Q. Are you a married man?

A. Yes sir.

Q. Any sons and daughters?

A. I have no sons—I have a laughter.

Q. You live in the city of Manhattan?

A. Yes sir.

Questions by Mr. O'Donnell:

Q. I understood you to say that in the event that you found a verdict for murder in the first degree that you would be in favor of hanging?

A. No, I don't think I would be in favor of hanging just because it was murder in the first degree.

Q. Would you be more in favor of that than of life imprisonment?

A. No, I don't think so; it would depend upon the evidence.

Q. Did you understand that no matter what the evidence may be, no matter how strong, no matter under what circumstances one man may kill another, that still a juror has a right to say whether or not he will hang him or give him life imprisonment—do you say that you don't think, that no matter what the evidence would be, that a juror would have a right to render a verdict recommending imprisonment for life—was that what you said?

A. Well, now, if that is the question you asked, it is not my position—did you put it that way?

Q. I thought so, as I understood it; if you will, just repeat what you were saying at that time?

A. I said it would depend upon the evidence as to whether I would vote in favor of prison for life or capital punishment.

Q. Now, do you understand that it does not make any difference what the evidence may be, how strong it may be, or how atrocious or bad the murder may be, yet the juror has an absolute right to say that he won't hang a man or vote for a verdict of that kind—you

268 understand that is the law?

A. Yes sir.

Q. That is, no matter what the evidence is, still it is up to you to say whether or not you would inflict the life penalty or death penalty?

Mr. Robertson: I think it is hardly fair to say that he can just capriciously disregard the evidence

The Court: This juror has not said that.

Q. No matter how atrocious it is or how innocent, you have the same right?

A. We have what right?

Q. To say whether or not, under the law, whether a man shall be hung or you have an absolute right in any state of the evidence to write into your verdict that no man shall be hung—now would you want to hang a man because you had an opportunity to do it?

A. No sir, not because I had an opportunity to.

Q. If you had an opportunity to discharge your duty under the law, so that the law was satisfied by voting a verdict for life imprisonment, would you render such a verdict?

A. Well, I might, I couldn't say whether I would until I would hear the case. I wouldn't want to say now how I would render a verdict in this case until I find whether it was murder in the first degree.

Mr. O'Donnell: That is all.

Mr. Robertson: We pass the juror.

Mr. O'Donnell: We excuse Mr. Harpsberger.

Mr. B. E. Harpsberger was excused under defendant's peremptory challenge.

H. L. WRIGHT, called as a juror, having been duly sworn, testified touching his qualifications to act as a juror in this cause, as follows:

269 Questions by Mr. Robertson:

—. Where do you live, Mr. Wright?

A. Lebanon, Smith county, Kansas.

Q. How far from Leavenworth?

A. About 238 miles.

Q. Have you heard anything about the facts in this case?

A. I have a recollection of reading about a couple years ago something like that.

Q. Have you an opinion as to the guilt or innocence of the defendant?

A. No.

Q. Are you opposed to the administration of capital punishment?

A. No, sir.

Q. Sir?

A. No sir.

Q. Have you heard the questions, the examination of the other men that are sitting in the jury box?

A. Yes sir.

Q. Are you acquainted with anybody that you see interested in this case?

A. I believe not.

Q. Do you know any of the lawyers representing the defendant?

A. No sir.

Q. You have heard the discussion here about the different forms of verdict in first degree murder cases?

A. Yes sir.

Q. Are you perfectly free to exercise your honest judgment on that matter?
A. I believe so.
Q. Have you been a juror before?
A. No sir.
Q. Never in any court?
A. No sir.
Q. What did you say your business is?
A. I am with a newspaper.
Q. What is the name of your paper?
A. The Lebanon Times.
Q. How long have you lived in Lebanon?
A. About 29 years.
Q. How long have you been in the newspaper business?
A. Practically all my life.
Q. And in connection with the same newspaper all the time, Mr. Wright?
A. The same place.

Q. Do you know of any reason at all why you should not
270 sit here as a juror?
A. No sir, none at all.

Questions by Mr. Kimbrell:

Q. What was your business before engaging in the newspaper business?
A. I started in as a boy into the newspaper work.
Q. Your father was in the newspaper before you, was he?
A. Yes sir.
Q. And at the same time?
A. Yes sir.
Q. Have you ever held any office in the administration of justice, mayor, police judge, or sheriff?
A. No sir.
Q. Ever been a candidate for such a place?
A. No sir.
Q. Confined your work to the newspaper, did you?
A. Yes sir.
Q. Have you any side business such as farming or building?
A. No sir.
Q. How old are you?
A. 38.
Q. Married?
A. Yes sir.
Q. Do you recognize the division of sentiment in our country upon the question of capitan punishment—do you?
A. Yes.
Q. You have heard some men here say this afternoon they would not under any circumstances favor capital punishment—and there are others with the other view—which view do you hold, if you are conscious of any view?

A. It depends on the evidence.

Q. That is, do you believe in every case of first degree murder, which is simply the deliberate premeditated killing with malice—that is the best definition—in common parlance, cold blooded murder—do you believe in every such case, there ought to be capital punishment?

A. No sir.

Q. I take it then, the circumstances under which the killing might occur, even though it was a cold-blooded killing, would affect your judgment in such a case—that is what you mean?

A. Yes sir.

Q. You saw the defendant here, when you were in the
271 court room the last of May?

A. Yes sir.

Q. You recognize him now?

A. Yes sir.

Q. The defense in his case is that he killed a guard by the name of Turner, because, in attempting to talk with the guard, Turner, to request Turner not to report him for some little infraction of the rules, Turner lost his temper and attempted to beat him, and that he killed him because of that. In considering the testimony that may be offered tending to prove his self defense, as I have indicated, would you let the fact that he is a convict and the other man in authority over him, prejudice you against the evidence?

A. No sir.

Q. You would consider that, even though he was a convict and though the other man was in authority, he would have a right to defend himself against the needless abuse of the other man?

A. Yes sir.

Q. You would accord him that right?

A. Yes.

The Court: Defendant's challenge.

And thereupon defendant challenged W. J. Kinsley, and he was excused under defendant's said peremptory challenge.

FRED LEGLER, called as a juror, having been duly sworn, testified touching his qualifications to sit as a juror in this case, as follows:

Questions by Mr. Robertson:

Q. You live at Valley Falls, Mr. Legler?

A. Yes sir.

Q. What is your business?

A. Lumber and building material.

Q. How long have you been engaged in that line?

A. Well, we have had the business about 20 years.

Q. You have been engaged in the business that long?

A. All excepting the time in school. I have been with the business practically, I would say, 16 or 17 years.

272 Q. Are you in any way acquainted with the facts in this case?

A. As I have read the newspapers and heard them here, yes sir.

Q. Have you an opinion as to the guilt or innocence of the defendant?

A. I would not say I had—no sir.

Q. Have you a feeling of opposition to capital punishment?

A. Yes sir, I have; I am rather opposed to capital punishment.

Q. Is that opposition such that it would effect your verdict if you are chosen here as a juror?

A. Well, I really don't feel that I could conscientiously bring in a verdict for capital punishment.

Mr. Robertson: It seems to me that Mr. Legler is disqualified.

Questions by the Court:

Q. You would not agree to that kind of a verdict that meant that the punishment would be death?

A. No, I would rather not, your Honor.

Q. Would you or would you not—don't say you would rather not?

A. No, I would not.

The Court: Stand aside.

Mr. O'Donnell: We except to the action of the court in dismissing Mr. Legler.

And to this ruling and action of the Court defendant still excepts.

T. M. JONES, called as a juror, having been duly sworn, testified touching his qualifications to sit as a juror in this case, as follows:

Questions by Mr. Robertson:

Q. You live at Abilene, Mr. Jones?

A. Yes sir.

Q. What is your business?

A. Cashier for several companies, the telephone company, Riverside Light and Power, Home Gas company, an electric com-

273 pan*h*, and one or two other companies.

Q. You are a busy man—have you heard anything about the facts in this case?

A. Not only what I have heard in the court room?

Q. Have you heard enough so that you now have an opinion as to the guilt or innocence of the defendant?

A. No sir.

Q. Have you any conscientious scruples against capital punishment?

A. I don't believe in capital punishment at all.

Q. Does that conviction go to the extent that you could not join in a verdict of that kind?

A. Yes sir.

The Court: You will be excused.

Mr. O'Donnell: Defendant excepts to the action of the court in excusing Mr. Jones.

And to this ruling and action of the court defendant still excepts.

E. M. Cook, called as a juror, having been duly sworn, testified touching his qualifications to sit as a juror in this case, as follows:

Questions by Mr. Robertson:

Q. You live at Monument, Kansas?
A. Yes sir.
Q. How far is that from Leavenworth?
A. 387 miles.
Q. Have you heard anything about this case, Mr. Cook?
A. Yes sir.
Q. Have you got an opinion now as to the guilt or innocence of the defendant?
A. Yes sir.
Q. Is that an opinion that it would take evidence to change?
A. It is.
Q. It is fixed firmly in your mind, is it?
A. Yes, it has been in my mind since the commission of the crime.
Q. You learned of it at that time?
A. Yes sir.

Mr. Robertson: I suppose there is no use taking further time with Mr. Cook.

Mr. Cook was thereupon excused by the court.

274 W. B. Ayars, called as a juror, having been duly sworn, testified as follows touching his qualifications to sit as a juror in this case.

Questions by Mr. Robertson:

Q. What county do you live in?
A. Keats, Riley county.
Q. How far is that from Leavenworth?
A. Well, it is about 130 miles.
Q. What business are you in, Mr. Ayars?
A. Farmer.
Q. How long have you lived there?
A. About fifty years in that county.
Q. Yes—have you heard about the facts in this case?
A. I think only what I have heard here.
Q. Have you an opinion as to the guilt or innocence of the defendant?
A. No, sir.
Q. Have you a feeling of opposition to capital punishment?

A. Well, I believe not—to a certain extent.
Q. Well, you understand what this case is about?
A. I think I do.
Q. You heard my statement, did you not?
A. Yes, sir.
Q. You heard the examination of the other gentlemen sitting in the jury box?
A. Yes.
Q. Do you think,.after hearing all that, that your mind is in such shape you could exercise a free and honest judgment as to the question of these different verdicts?
A. I think so, yes, sir.
Q. You will do that, if you are chosen as a juror?
A. Yes, sir.
Q. Are you a married man?
A. Yes, sir.
Q. Have you a family?
A. Yes, sir.
Q. How large a family have you?
A. Eight children.

Q. Do you think of any reason at all why you should not
275 be chosen here as a juror?
A. I don't know of any.

Questions by Mr. Kimbrell:

Q. Do you know Mr. Morgan, the warden?
A. No, sir.
Q. Were you ever in the newspaper business?
A. No, sir.
Q. Always been a farmer?
A. Yes, sir.
Q. Did you ever serve in your county as sheriff or peace officer in any way?
A. No, sir.
Q. You know the defendant here is, and since he was a boy has been, a convict—you knew that, did you?
A. No, sir, I didn't know that.
Q. Well, that will be the evidence, and the man he killed was a guard in authority over him—and the fact that he was a convict at the time will, of course, be established by the evidence. His defense is that the guard, in anger, because of some attempted discussion of a matter important to him, tried to assault him with his club, and that he did what he did in self-defense. There will be some evidence of that, I think from both sides. But would the fact that he was a convict and long had been, and that the man he killed was a guard in authority over him, prejudice you in considering the evidence which tended to establish his right of self-defense?
A. Well, I don't know; I don't believe it would.
Q. You would give him a fair trial on that issue, would you not?
A. I think I could.

Q. Just as if he had been a man on the outside that tried to resist injury in that way?
A. Just the same as any other man who pleaded self-defense.

Mr. Kimbrell: That is all. I would like to ask Mr. Wright an additional question.

H. L. WRIGHT, heretofore called and examined, further tes-
276 tified as follows:

Questions by Mr. Kimbrell:

Q. You and Mr. Morgan, I take it, are members of the same newspaper association, are you not?
A. No, sir, I don't belong.
Q. Do you know Mr. Morgan?
A. No, sir.
Q. Did you ever belong to the association?
A. No, sir.
Q. Did you take any notice of this occurrence as a news item?
A. No, sir.

Mr. O'Donnell: We excuse Mr. Wright.

And thereupon, under defendant's peremptory challenge, Mr. H. L. Wright was excused.

WILLIAM BABST, called as a juror, having been duly sworn, testified as follows touching his qualifications to sit as a juror in this case:

Questions by Mr. Robertson:

Q. Where do you live, Mr. Babst?
A. Junction City.
Q. What is your business?
A. Retired farmer.
Q. You live in the city?
A. Yes, sir.
Q. How long have you lived there?
A. Off and on, 13 years.
Q. Have you heard what are purported to be the facts in this case?
A. I did in May when I was up here, something about it, and then I read something about it in the paper.
Q. Well, have you an opinion as to whether the defendant is guilty or innocent?
A. I seen that in the paper, well, I formed my opinion.
Q. Don't say what the opinion is, have you got an opinion?
A. Yes, sir.
Q. Is that a fixed opinion, in your mind?
A. Almost.
Q. You have got your mind made up what ought to be done, have you?
A. Yes, sir.

Q. Would you have to hear evidence before you changed your mind?

277 A. I don't know whether I would change my mind or not, even if I do hear evidence.

Q. Even if you did hear the evidence?

A. No, sir.

The Court: Stand aside.

J. S. MESERVE, called as a juror, having been duly sworn, testified as follows touching his qualifications to sit as a juror in this case:

Questions by Mr. Robertson:

Q. What is your name?

A. J. S. Meserve.

Q. Spell it please?

A. M-e-s-e-r-v-e.

Q. Where do you live, Mr. Meserve?

A. Ellis, Kansas. Ellis, Ellis county, Kansas.

Q. How far from Leavenworth?

A. 297 miles I think—it is within 333 miles of Kansas City.

Q. What is your business?

A. Farmer and stock raiser.

Q. Have you heard anything about this case?

A. I did at the time.

Q. Have you an opinion now as to the guilt or innocence of the defendant?

A. No, sir.

Q. Are you in any way opposed to capital punishment?

A. I would not want to—I am some, yes.

Q. Are you so opposed to it that if you could avoid voting for that kind of verdict, you would do it?

A. If I could avoid it, I would.

Mr. Robertson: We challenge the juror for cause.

The Court (to defendant's counsel): You may inquire.

Questions by Mr. O'Donnell:

Q. Mr. Meserve, is your name?

A. J. S. Meserve, yes, sir.

Q. You live at Ellis?

A. 12 miles south.

278 Q. Is that out on the Union Pacific, due west?

A. Yes sir.

Q. You say you are opposed to capital punishment—is that a matter of policy—public policy?

A. That is my own inclination.

Q. That is, is it question of conscientious scrupoes or is this a question of policy—is this a question of public policy or a question of conscientious scruples?

A. I would call it policy.

Q. So that you believe in the public policy that does not believe that society will be destroyed unless men are put to death. But notwithstanding that belief, would you follow the instructions of the court and do your duty under your oath as a juror?

A. Yes.

Q. You would do that?

A. Yes sir.

Q. That is, you would follow the dictates of your conscience in writing the penalty into the verdict?

A. Yes.

Q. If you are sworn as a juror, and you listen to the evidence and the court gives you instructions, you would do what your conscience dictates, no matter to what lengths you would have to go, and notwithstanding the fact that you may not believe in that policy individually, yet if your duty required you, under the instructions of the court and the evidence, you would vote for capital punishment?

A. I would if I had to.

Q. That is, if your duty required you—by that you mean, you would follow the dictates of your conscience and the instructions of the court?

A. Yes sir.

Questions by Mr. Robertson:

Q. I understood you to say, Mr. Meserve, that if you could avoid voting for a verdict that meant death, you would do it—did you mean that?

A. Yes.

Q. If you were a juror here, and were in that situation that *situation that* you could vote for some verdict less than death, you
279 would do it—that is the way you feel?

A. It is.

Q. And that is the way you would act if you were a juror?

A. Yes sir.

Mr. O'Donnell: One other question:

(By Mr. O'Donnell:)

Q. Mr. Meserve, when you say that you would vote for some other verdict than capital punishment, in answer to Mr. Robertson, you mean that you would if your conscience would let you do that?

A. Yes sir, I do.

The Court: You will be excused.

Mr. O'Donnell: We except to the action of the court in excusing Mr. Meserve.

And to this ruling and action of the Court, defendant still excepts.

IRVING HILL, called as a juror, having been duly sworn, testified touching his qualifications to sit as a juror in this case, as follows:

Questions by Mr. Robertson:

Q. You are Mr. Irving Hill, and you live at Lawrence?
A. Yes sir.
Q. What is your business?
A. Paper manufacturer and some other lines of business.
Q. Have you heard anything about the facts in this case?
A. I have.
Q. Have you heard enough so that you have an opinion now, as to the guilt or innocence of this defendant?
A. I believe not.
Q. Are you opposed to capital punishment?
A. I am not.
Q. You have heard the discussion about the different forms of verdict in first degree murder cases?
A. I have; yes sir.
280 Q. Do you feel, after hearing that discussion, you are perfectly free to exercise an honest judgment as to the question of which form of verdict you would be in favor of, if you should find the defendant guilty of first degree murder?
A. Do you wish me in answer to that to give you my opinion in regard to it?
Q. Have you in your mind any conscientious scruples that would keep you from being perfectly free in favor of either form, as the facts might justify?
A. I can vote for either form. I doubt if I could answer your question that I am perfectly free.
Q. You mean by that that you have a feeling of preference one way or the other in the matter?
A. I have.
Q. Which way?
A. I am most favorable to capital punishment.
Q. You favor it in case of first degree murder?
A. Yes.
Q. You think notwithstanding that, you could give the defendant justice and decide the case on the facts and the law you get here?
A. I believe so.
Q. You think you could disregard that preference, and decide it solely on what you get here in the court room?
A. I think so.
Q. Would you endeavor to do that if you are chosen as a juror?
A. I would.

Mr. Robertson: Pass the juror.
Mr. O'Donnell: We challenge the juror, for cause.
The Court: Overruled.
Mr. O'Donnell: We except to the ruling of the court.

Questions by Mr. O'Donnell:

281 Q. I believe you said you have heard something about the case.

A. I did.

Q. Where was that?

A. It was on the road here, the first time I was called to the case.

Q. When you were coming from Lawrence to this court room?

A. Yes sir.

Q. And were you then coming as a juror to try this case?

A. As a juror without knowledge of the case.

Q. Did you know you were coming to try this case?

A. I did not.

Q. With whom did you talk?

A. I could not give the name, because I don't know.

Q. Did he purport to be a government official?

A. He did not.

Q. Did his language indicate that he had knowledge of the facts?

A. He was an attorney.

Q. He was an attorney?

A. Yes sir.

Q. Did he state what the facts were? I don't mean for you to repeat what the facts were.

A. He gave a somewhat detailed statement of the history of the defendant in the case.

Q. He undertook to tell you about the defendant?

A. He did not tell it to me. His statement covered the ground mentioned.

Q. Do you know who he was talking to?

A. I do not.

Q. It was just a casual conversation you chanced to hear?

A. It was.

Q. Did you hear anything else about the case after that, Mr. Hill?

A. No sir, nothing except what I heard in court.

Q. Yes sir—were you here on the 23rd of May and heard something in the court room then?

The Court: He was here on the 20th, I don't think he was here on the 23rd.

Q. On the 23rd you read something in the newspapers?

282 A. Yes, some things.

Q. And from what you have heard and read about it, you have, as I understood you, some kind of an opinion about the case?

A. I would not call it an opinion myself.

Q. Well, you have got some idea about it, Mr. Hill, that would require evidence to change—that idea?

A. I heard the brief statement, but——

Q. The point about it is, has what you have heard about the case caused you to have an opinion about the case, one way or the other?

A. I would not call it an opinion.

Q. What would you call it?

A. A first impression.

Q. Well, Mr. Hill, would it require evidence to remove that impression?

A. I might answer it another way; I would not form an opinion without further evidence.

Q. This impression that you have, would it require evidence to change it?

A. I think I had better answer the question by saying there is nothing to change. I don't have an opinion in my mind.

Q. However, this impression that was formed in your mind was formed because you believed the statement to be true that you heard?

A. I don't think I could answer that, yes; it was a judicious, plain statement.

Q. You believed it?

A. I simply heard that statement.

Q. Did you have any reason to believe it?

A. No.

Q. Did you have any reason to doubt it?

A. No more than my general knowledge that there is two sides to a good many questions.

Q. Was this a statement of the facts concerning the killing of this prison guard by the defendant?

A. Not in detail.

Q. You say not in detail—was that mentioned?

A. Yes, as I remember it, he incorporated with the statement that the guard had been killed by this defendant here.

283 Q. So that, from that you have an impression or conviction about the killing?

A. I have an impression but not a conviction.

Q. You have an impression that it would require evidence to remove?

A. I answered that question a moment ago—shall I repeat that?

Q. You can aswer that, yes or no?

A. I said I had no opinion I had an impression.

Q. You have an impression that would require evidence to remove?

A. No.

Q. Your answer is it would not require evidence to remove that—is that your answer?

A. That is my answer.

Q. Now, with reference to capital punishment, I believe you said something about that?

A. I said if I had a choice between the two forms it was in favor of capital punishment.

Q. Is that because in that kind of a case, you believe in the policy of capital punishment?

A. Yes sir, in certain cases.

Q. Or do you believe that because of what you heard when coming here to try the case?

A. What I heard has not changed my opinion one way or the other.

Q. As I get you then, Mr. Hill, if you were sworn as a juror to try this case, and if you had an opportunity to hang the man, you would do it—that is, if you believe from the evidence he was guilty of first degree murder?

A. I would not consider it an opportunity. If I concluded he was guilty of first degree murder, I would vote for capital punishment as a duty not as an opportunity.

Q. However you regard it, as a duty or an *an* opportunity, if you found the defendant guilty of first degree murder, the only punishment you would vote for would be capital punishment?

284 A. I beg to differ: I didn't say that the only one I would vote for would be capital punishment. As a preference I would vote for capital punishment. I think the evidence could be such that I would vote for life imprisonment.

Mr. Robertson: That is objected to as not a fair question.

The Court: He may answer.

Q. Proceed?

A. The evidence could be such that I would vote for life imprisonment.

Q. But to start with your state of mind is such that you would vote for capital punishment if satisfied by the evidence that he was guilty of first degree murder—that is the only verdict you would vote for?

A. That is repetition.

Q. Are you opposed to life imprisonment as a punishment for first degree murder?

A. No.

Q. Are you acquainted with Mr. Robertson?

A. No sir.

Q. Or with Mr. Morgan?

A. No sir.

Q. Or with any of the prison officials?

A. No sir.

Mr. O'Donnell: We challenge the juror for cause.

The Court: Overruled .

Mr. O'Donnell: We except to the ruling of the court.

And to this ruling of the Court defendant still excepts.

And thereupon defendant peremptorily challenged Irving Hill, and he was excused under such peremptory challenge.

WILLIAM KATZ, called as a juror, having been duly sworn, testified touching his qualifications as a juror to sit in this case, as follows:

Questions by Mr. Robertson:

Q. Where do you live?

A. Nemaha county.

Q. What is your post office?

A. Seneca, Kansas.
285 Q. How far do you live from Leavenworth?
A. It is about 108 or ten miles.
Q. How long have you lived out near Seneca?
A. I have lived there all my life.
Q. Have you heard anything about the facts in this case?
A. I have.
Q. Enough so that you now have an opinion as to the guilt or innocence of the defendant?
A. Yes.
Q. Is that a fixed opinion in your mind?
A. Yes sir, it is.
Q. So fixed that it would have a bearing upon your verdict if you are chosen here?
A. Yes, I think it will.
Q. You think you could not go on and try the case on the evidence you get here in the court room and on the law, and disregard your opinion?
A. No sir, I could not.
Q. You have got your mind fully made up as to what you think ought to be done?
A. Well, I have heard a good deal about it, yes.

The Court: You are excused.

There being no more jurors present from the venire heretofore issued, the Court here ordered a venire issued for ten additional jurymen to be summoned by the marshall from outside of Leavenworth county.

The Court: You gentlemen here, will obey the caution of the court, and not disqualify yourselves during recess. You will be excused until ten o'clock tomorrow morning. Be here promptly so that we will not have to wait on anyone.

And thereupon the court took recess until ten o'clock a. m. of the following morning, June 25, 1918; on which day and hour
286 the selection of the jury was resumed, as follows:

JOHN PUTNAM, called as a juror, having been duly sworn, testified touching his qualifications to sit as a juror in this case, as follows:

Questions by Mr. Robertson:

Q. Your name is Putnam?
A. John Putnam.
Q. Where do you live, Mr. Putnam?
A. Atchison.
Q. Were you here yesterday?
A. No sir.
Q. You have not heard a statement of what this case is about—have you heard the statement I made about the case at all?

A. I was here in May.

Q. This is a case where the defendant here, Robert F. Stroud, is charged with murder in the first degree—that is to say, he is charged with, on the 26th day of March, 1916, stabbing an officer of the prison out here, the Federal penitentiary, near this city, and killing him instantly by stabbing him in the heart with a dagger. The claim of the government is, the charge in the indictment is that that was done deliberately, premeditatedly, cold bloodedly—a cold blooded murder. The punishment in a case of that kind, if the jury would find a man guilty of first degree murder, under those circumstances, might be death; or, if, in the exercise of your discretion as a juror, you thought it ought to be, you could make it life imprisonment, by qualifying the verdict. There is also included in that charge murder in the second degree and manslaughter, as the law contemplates, which are known as lesser offenses. Now, the question is; have you heard of this case before?

A. I read something about it.

Q. Were you here in May, when there was some discussion in the court room, about a month ago?

A. Yes sir.

Q. Have you heard enough so that you have an opinion
287 as to the guilt or innocence of the defendant?

A. I have no opinion.

Q. Have you a feeling of opposition to the administration of the death penalty in cases of this kind?

A. I have.

Q. You have?

A. Yes.

Q. Is that a fixed feeling of prejudice against taking the life of a defendant in cases of this character?

A. That is the way I feel about it.

Q. If you were a juror here, and had the opportunity of favoring either a verdict of death or a verdict of life imprisonment, do you now know which verdict you would vote for?

A. Yes sir.

Q. For life imprisonment, would you?

A. Yes sir.

Q. Would not vote for death in any event?

A. No sir.

Mr. Robertson: We challenge the juror.

The Court: You will be excused.

Mr. O'Donnell: An exception to the defendant.

And to this ruling and action of the court defendant then and there duly excepted and still excepts.

O. B. FULLER, called as a juror, having been duly sworn, testified touching his qualifications to sit as a juror in this case, as follows:

Questions by Mr. Robertson:

Q. What are your initials, Mr. Fuller?
A. O. B.
Q. Where do you live?
A. Kansas City, Kansas. 1941 North Seventh street.
Q. Are you engaged in business in Kansas City?
A. Not at present.
Q. Were you formerly?
A. I was truant officer for the city.
Q. For the city schools?
A. Yes. I am not that any more.
288 Q. Have you heard what the facts are in this case, any more than has been stated here in the court room?
A. The first I remember anything about this case was your statement when I was here as a juror.
Q. You heard my statement as to what this case was about?
A. Yes sir.
Q. You understand it is a charge of first degree murder?
A. Yes, I understand that.
Q. And you understand that the juror has a chance to exercise a judgment and discretion as to the sort of verdict they may render, that is, in a first degree murder case?
A. Yes sir.
Q. You understand that?
A. Yes.
Q. Have you an opinion as to the guilt or innocence of the defendant?
A. None whatever.
Q. Have you a feeling of prejudice against the administration of the extreme penalty in cases of that kind?
A. No sir.
Q. You feel you would be free as a juror, if you were chosen here, do you, to exercise an honest discretion, when acting upon these different verdict forms?
A. Yes sir.
Q. And you feel you would be perfectly free to vote for the extreme penalty if the facts and the law warranted it?
A. Certainly.
Q. How long have you lived in Kansas City?
A. About 25 or 30 years.
Q. Where did you live previous to your residence there?
A. Pittsburg, Kansas.
Q. How long in Pittsburg?
A. Three years.
Q. Before that where did you reside?
A. Burlington.
Q. Coffey county?

A. Yes.
Q. How long there?
A. I guess about seven or eight years.
Q. Are you a married man?
A. Yes sir.
Q. How large a family have you?
289 A. Just my wife.
Q. Do you know of any reason at all why you would not make a fair juror here?
A. No sir. I don't know the circumstances. I don't remember anything about the case. If I read it, it passed from my memory.

Questions by Mr. Kimbrell:

Q. How old are you?
A. 38—will be the 26th of July.
Q. Have you served in any other official capacity than that of truant officer?
A. Yes, I was in the sanitary department one time.
Q. Were you ever sheriff?
A. No sir.
Q. Deputy sheriff or constable?
A. No sir.
Q. Were you ever a police officer, a member of the regular police department?
A. I held a commission.
Q. But your duties were in connection with the sanitary department altogether?
A. Yes sir.
Q. You say you are not opposed to capital punishment?
A. No sir.
Q. You are aware of the division of sentiment in our country as to the wisdom of capital punishment in murder cases?
A. Yes sir.
Q. You know a great many people believe one way and a great many another?
A. Yes sir.
Q. Do you advocate capital punishment?
A. Yes sir, in certain cases.
Q. You are opposed, are you, to anything else than capital punishment in first degree murder cases?
A. In first degree—yes sir.
Q. Your feeling is, if you prove first degree murder that a man should be executed, if proven guilty of it, and not given life imprisonment?
A. Yes sir.
Q. You would oppose then life imprisonment in any case
290 of first degree murder?
A. Certainly.

Mr. Kimbrell: We challenge the gentleman.

The Court: His answers are a little bit inconsistent. He answerd the government's attorney that he would be free to exercise his judgment upon the facts in the case, whether it would be death or imprisonment for life. His answers are a little indefinite.

Mr. Kimbrell: I gather from the answers that the gentleman opposes a life sentence in the first degree murder cases.

The Court: He says that in answer to your question, but in answer to the attorney for the government he states he would be free to exercise his judgment. You may make any further inquiry, if you desire, Mr. Robertson?

Mr. Robertson: I believe I will join in the challenge.

The Court: Stand aside, then.

E. S. KING, called as a juror, having been duly sworn, testified as follows touching his qualifications to sit as a juror in this case:

Questions by Mr. Robertson:

Q. Your name is Mr. King?
A. E. S. King.
Q. Where do you live?
A. Kansas City, Kansas.
Q. Where do you live in Kansas City?
A. 1917 North Ellis.
Q. What is your business?
A. Cashier for the Irving-Pitt Manufacturing Company.
Q. How long have you lived in Kansas City?
A. Four years.
Q. Where was your previous residence?
A. St. Joseph, three years.
Q. What has been your business before you were engaged with the Irving-Pitt Company?

A. I did office work at St. Joseph three years; previous to
291 that I was on a farm.

Q. Are you a married man?
A. (Answer inaudible.)
Q. Have you heard anything about the facts of this case, more than has been stated here in the court room?
A. Nothing.
Q. Have you any opinion as to the guilt or innocence of the defendant?
A. No sir.
Q. Have you a feeling of opposition to the administration of capital punishment in first degree murder cases?
A. Well, I would have to know the facts in the case, in order to determine that.
Q. The question is, without taking the facts into consideration at all, just as a matter of general consideration, have you to start with, a prejudice against taking the life of a defendant, even though he may be guilty of the most heinous murder?
A. Yes sir.
Q. You are prejudiced against it?

A. Yes sir.

Q. Now, if you are a juror here and had the choice to decide between capital punishment and life imprisonment, do you know now which one you would decide for?

A. After hearing the case, I could tell that.

Q. Mr. King, you have heard the statement I have made in this case: if you are chosen as a juror in this case, and if you find the defendant guilty of murder in the first degree, you have the privilege of deciding between two forms of verdict one of whch would mean life imprisonment and the other capital punishment? You heard that statement?

A. In first degree murder I understand it is life imprisonment or the death sentence.

Q. Now, about this further matter: are you perfectly free, if you are chosen as a juror here, to exercise an honest discretion between these verdict forms and to decide this case according to the facts you get here?

A. Yes sir.

Mr. Robertson: Pass the juror.

292 Questions by Mr. Kimbrell:

Q. Mr. King, the defendant in this case is a young man here, twenty-six or seven years old. From the time he was 19 years old he was confined in the Feceral prison here and his home was in Alaska. At the time of the killing, he was a prisoner and he killed a guard, a man in authority over him, because, as we claim the evidence will show, defendant requested that he do not report him in order that he might see his brother whom he had not seen for years, and the guard became angry and tried to use his club on him, and he held it as long as he could, and finding that he could not defend himself that way, he stabbed him. That is, his defense is self-defense. But would the fact that he was a convict and that he killed a man in authority over him, prejudice you in considering the evidence that might establish his right of self-defense?

A. Well, in that case it might.

Q. Do you feel that just because he was a convict, and because this man was over him, that the guard had a right to beat him up and mistreat him, and that he had no right to protect himself, there being nobody else to help him—have you that feeling about it? Do you feel that convicts should simply submit to any mistreatment and violence that the guard saw fit to subject him to, and would not have a right to protect himself?

A. The officer is superior, isn't he?

Q. Do you feel that gives him the right to set aside the natural right of every man to protect himself, just because he is bigger than the other fellow in authority?

A. Yes, sir.

Mr. Kimbrell: We challenge.

Mr. Robertson: Maybe Mr. King does not understand that line of questions.

293 The Court: Go ahead.

Questions by Mr. Robertson:

Q. I am not clear whether you understand the question, Mr. King, that has been propounded to you. The question I think is this: Assuming a man is in prison as a convict, and there is an officer who is known there by the title of guard, who is a civilian, not a convict; now, the question is, if this guard, for some personal reason undertook to make an unlawful assault upon this prisoner, even to killing him, is it your idea that this prisoner could not protect himself?

A. He is his superior officer—the man he stabbed was?

Q. That is the charge here. Now, apart from that entirely, what counsel was trying to get at, and what I am trying to get at, is this: if you were chosen as a juror, are you willing to accord to a convict, even though he were a convict, that right, if the law gives it to him? If a man is a convict, even though he be a convict, can not you see that he would have a right to protect his own life against improper assault?

A. In some circumstances he might.

Q. Have you ever been a juror in a case?

A. No, sir.

Q. Now, what if the court here would say to the jury that under the law, a convict has the same right to protect his own life and person that a man has who is not a convict, would you follow that instruction?

A. State the question again; I am not sure I understand it.

Q. If the court—you understand that in the trial of cases, you get your law from the court; if you are a juror, you have got to lay aside any ideas you have of your own about the law, and have to take implicitly and absolutely what the court says is the law—you understand that?

A. Yes, sir.

Q. And you sit here and determine the facts—you understand?

A. Yes, sir.

294 Q. Now, then, would you be willing to obey implicity what the court tells you is the law?

A. Yes sir.

Q. And if the court tells you that a convict has the same right that you have to defend himself against unlawful assault, would you observe that instruction?

A. I don't know that I would.

Mr. Robertson: I will join in the challenge.

The Court: Stand aside.

C. W. LAYMAN, called as a juror, having been duly sworn, testified touching his qualifications to serve as a juror in this case, as follows:

Questions by Mr. Robertson:

Q. What is your name?
A. C. W. Layman.
Q. How do you spell it, Mr. Layman?
A. L-a-y-m-a-n.
Q. Where do you live?
A. Kansas City, Kansas.
Q. What is your business?
A. Salesman for the Wyandotte Awning company.
Q. What number do you live, in Kansas City?
A. 1919 North Eighth Street.
Q. How long have you lived in Kansas City?
A. About 22 years.
Q. Have you heard anything about this case more than has happened here in the court room?
A. No sir, not definitely.
Q. Have you heard enough so that you have an opinion as to the guilt or innocence of the defendant?
A. No, I don't think so.
Q. Did you have any mental reservation or hesitancy in making that statement?
A. No sir.
Q. Sir?
A. No sir.
Q. Now, Mr. Layman, have you any feeling of opposition against administering the death penalty if the facts and the law warrant it?
A. Yes sir.
295 Q. You have?
A. Yes sir.
Q. Could you vote for a verdict that meant death for the defendant?
A. No sir, I could not do that.

Mr. Robertson: Challenge Mr. Layman for cause.
The Court: You will be excused.
Mr. O'Donnell: We except to the action of the Court.

And to this ruling and action of the court defendant still excepts.

G. M. MILLER, called as a juror, having been duly sworn, testified touching his qualifications to sit as a juror in this case, as follows:

Questions by Mr. Robertson:

Q. Where do you live, Mr. Miller?
A. Kansas City, Kansas.
Q. How long have you lived there?
A. 15 years.
Q. What is your business?
A. Motorman for the street car company.

Q. Have you heard anything about the purported facts in this case?
A. No sir.
Q. Do you have any feeling of opposition against the administration of the extreme penalty in cases of this kind?
A. No sir.
Q. Have you any feeling of opposition to that?
A. No.
Q. Did you hear my statement of what this case was about?
A. Yes sir.
Q. And the kinds of verdict that may be considered?
A. Yes sir.
Q. Are you perfectly free to consider the two kinds of verdict, and do what the law and evidence justifies?
A. Yes sir.
Q. What part of Kansas City do you live in?
A. 1905 North Mill Street.
Q. Are you a married man?
A. Yes sir.
296 Q. What family have you, Mr. Miller?
A. My wife and I.
Q. How long have you worked for the street car company?
A. Fourteen years.
Q. Do you know of any reason at all why you would not make a fair juror here, who could take the facts and the law you get in the court room and do exact justice?
A. No sir.
Q. Have you ever been a juror before?
A. Yes sir.
Q. In the Federal court?
A. No.
Q. In Wyandotte county, Kansas?
A. Yes sir.
Q. Have you sat in criminal cases?
A. Yes sir.
Q. You understand, Mr. Miller, that lawsuits are to be tried and determined upon what is gotten in the court room in the presence of the court, and that alone?
A. Yes sir.

Questions by Mr. Kimbrell:

Q. Do you know Mr. Robertson?
A. I met him once.
Q. Under what circumstances?
A. I met him at a Red Cross meeting, I believe.
Q. You have not been associated with him in the preparation of any cases?
A. No sir.
Q. Have you ever been a police officer?
A. No sir.

Q. Sheriff or deputy sheriff?
A. No sir.
Q. Ever been engaged in any way in the administration of justice?
A. No sir.
Q. What was your work before you went to work for the street car company?
A. Farmer.
Q. Where?
A. Platte county, Missouri.
Q. How old are you?
A. 28.
Q. Do you believe in and advocate capital punishment in first degree murder cases?
(No answer.)
Q. Do you hold the view that in all first degree murder cases, capital punishment should be administered?
297 A. According to law and the testimony.
Q. That is, it would depend upon the facts?
A. Certainly—yes.
Q. The defendant in this case is this young man sitting over here. He has been an inmate of the Federal prison here since he was about 19 years old, and was at the time of the killing, of a guard. Because of some controversy that arose when he asked the guard some question about setting aside a report his claim is that the guard lost his temper and started to beat him with the club, and defendant defended himself. His defense is self defense. From that you see that he was a convict and the other man a guard over him. Now, would the fact that he was a convict under the man who was trying to beat him viciously and unnecessarily, would the fact of the relation between the two men prejudice you in the consideration of the evidence tending to show his right of self defense—do you feel that even a convict has a right to defend himself?
A. If he is going to be killed.
Q. Or very severely punished or beat*ed* up—do you think he would have a right to protect himself?
A. Yes.

Mr. Kimbrell: That is all.
The Court: Mr. Robertson, do you accept the jury?
Mr. Robertson: Yes.
The Court: Have you had 20 challenges, gentlemen?
Mr. O'Donnell: Mr. Andres said last night, we had 18.
The Court: I have 20—according to my record, it is 20, but if you are in doubt about it, I prefer to give you another challenge.
Mr. O'Donnell: We will excuse Mr. Miller.

298 T. M. Miller was then excused under defendant's peremptory challenge.

W. H. WOOLEY, called as a juror, having been duly sworn, testified touching his qualifications to sit as a juror in this case, as follows:

Questions by Mr. Robertson:

Q. Where do you live, Mr. Wooley?
A. Kansas City, Kansas, 715 Virginia avenue.
Q. What is your business?
A. Common labor.
Q. May I ask you who you are working for at this time?
A. I have been sick quite a little; I am not working for anybody at the present time.
Q. Have you heard anything about the purported facts in this case?
A. No sir, nothing only what I have heard here.
Q. Did you hear the statement I made here?
A. Yes sir.
Q. Have you any opinion now as to the guilt or innocence of the defendant?
A. No.
Q. You have no opinion?
A. No.
Q. Are you opposed to the taking of human life as a punishment in first degree murder cases?
A. For certain things I would be in favor of capital punishment.
Q. In murder cases such as I have stated this one is, are you opposed to capital punishment?
A. No sir.
Q. Sir?
A. No sir.
Q. You are not opposed to it?
—. No.
Q. Did you understand what I have said about the case: in first degree murder cases, under the laws of the United States, and that is the law we have here, not the law of Kansas,—under the law of the United States, under that law, there are two forms of verdict that the jury may consider, one meaning life imprisonment, on the one hand, and the other form might be death, on the other hand—do you understand that?
299 A. Yes sir.
Q. Are you in that frame of mind that you could exercise an honest discretion between those forms of verdict?
A. Yes sir.
Q. Could you treat both defendant and the government fairly in that?
A. Yes sir.
Q. And decide this case according to the law that you get here in the court room, and the facts you get here?
A. Yes.
Q. You have no prejudice against either of these forms of verdict, have you?

A. None—I try to do right.
Q. And will you do that, if you are a juror?
A. Yes.
Q. Do you know any of the attorneys you see interested here, Mr. O'Keefe, Mr. Kimbrell, Mr. O'Donnell or Mr. Andres?
A. I do not.
Q. Are you a married man?
A. Yes sir.
Q. What family have you?
A. My wife and two children.

Mr. Robertson: That is all.

Questions by Mr. Kimbrell:

Q. How old are you?
A. 68.
Q. Where were you born and raised?
A. Born and raised in Buchanan County, Missouri.
Q. How long have you lived in Kansas?
A. 18 years.
Q. Have you ever served as sheriff or deputy sheriff?
A. No sir.
Q. Were you ever on the police force?
A. No sir.
Q. Farmed all your younger days?
A. Yes sir.
Q. How old were you when you left the farm?
A. I left there about thirty-eight or forty years ago.
Q. Have you ever been engaged in any mercantile business?
A. No sir.
Q. Have you ever engaged in the work of building—building contractor or carpenter?
A. No.

300 Mr. Kimbrell: That is all.

The Court: Do you accept the juror, Mr. Robertson?

Mr. Robertson: Just a moment, your Honor, I want to consult with Mr. Harvey. Yes, the government will ac-ept the juror.

Mr. Kimbrell: We pass.

Mr. O'Donnell: How many challenges does the court hold we have exercised?

The Court: According to my talley, you have exercised twenty-one. What is your check, Mr. Harvey?

Mr. Harvey: Twenty-one.

Mr. Kimbrell: Will the court permit us, according to Mr. Andres' count, to challenge one more man?

The Court: I have no objection to your having one more, out of the abundance of caution. One more.

Mr. Kimbrell (to juryman): Your name is——?

The Juror: Hayes.

Mr. Kimbrell: We excuse Mr. Hayes.

Dick Hayes was thereupon excused under defendant's peremptory challenge.

H. C. COONS, called as a juror, having been duly sworn, testified as to his qualifications to serve as a juror in this case as follows:

Questions by Mr. Robertson:

Q. What are your initials?
A. H. C. Coons.
Q. Spelled C-o-o-n-s?
A. Yes.
Q. Where do you live?
A. 825 Garfield, Kansas City, Kansas.
301 Q. How long have you lived in Kansas City?
A. 11 years.
Q. What is your business?
A. ——.
Q. Doing contract work?
A. Yes, working for a contractor.
Q. Have you heard anything about the facts in this case more than has been stated here in the court room?
A. No sir, I have not.
Q. Have you any opinion, then, as to the guilt or innocence of the defendant on trial here?
A. None whatever.
Q. Do you have a feeling of opposition to the taking of human life in punishment for murder committed?
A. Well, I don't think I have if the facts——
Q. Of course that question is based upon this, that the facts and the law would first justify it before—that the facts you would get as a juror in the court room and the law as the court gave it to you, would justify a verdict of that sort—would you be free as far as your conscience is concerned, to vote for it?
A. Yes sir.
Q. Do you understand also that in first degree murder cases, you may also consider whether the verdict should be life imprisonment—you understand that, don't you?
A. Yes sir.
Q. Are you perfectly free to consider both those forms from the standpoint of the facts and the law?
A. Yes sir.
Q. And determine which one on the facts that you get here in the testimony—you are free to do that?
A. I am.
Q. Are you a married man?
A. Yes sir.
Q. What family have you, Mr. Coons?
A. Just my wife.
Q. Now, do you know of any reason at all, why you would not make a fair juror here between the government and the defendant?
A. None whatever.

Questions by Mr. O'Donnell:

Q. Mr. Coons, how long have you lived in Kansas City, Kansas?

A. 11 years.

302 Q. Are you acquainted with Mr. Robertson, the gentleman who just addressed you?

A. How is that?

Q. Are you acquainted with Mr. Robertson?

A. No sir, never saw the gentleman before.

Q. Or with any of the prison officials?

A. No sir, none at all.

Q. Where did you live before coming to Kansas City?

A. Kentucky.

Q. Mr. Coons, you understand, I believe, that in first degree murder cases, you have a right, for any reason that seems good to you, to render a verdict for the death penalty or for life imprisonment—have you any preference between those forms of punishment?

A. Well, no sir, I have not. To hang a person, I would not unless the evidence was strong enough.

Q. That is, you would not go into the jury box with a predisposition in favor of hanging a man?

A. No sir, I would not do that.

Q. And you know of no reason why you would not be an impartial juror in this case?

A. No sir.

Q. Would the fact that the defendant is a convict and was a convict at the time of the alleged killing, prejudice you in the consideration of testimony tending to establish his side of the case, his defense?

A. No, it would not.

Q. It would not—Have you ever been a public official of any kind?

A. Nothing more than a juror.

Q. What is that?

A. Nothing more than a juror.

Mr. O'Donnell: That is all. That exhausts the challenges, I understand?

The Court: Yes. If counsel on either side suspect that any juror is incompetent or have any doubt about it, you may make inquiry of that juror.

Mr. O'Donnell: We have no further questions.

303 The Court: Swear the Jury.

And thereupon the jury were duly sworn to try the issues herein.

Mr. Robertson: If your Honor please, I think it *it* is only fair to the jury, as well as to the defendant and the government, that they be kept together from now on, while this case is being tried; and I ask your honor to make an order to keep them together.

The Court: Have you a fitting place?

Mr. Robertson: I know the marshall has found a place; as to the conditions, I do not know anything about that.

The Court: I will talk to the marshall about that. You may make your statement of the government's case.

304 Mr. O'Keefe: If your Honor please, the defendant asks for the separation of the witnesses, that is their exclusion from the room during the trial of the case, especially during the statement of counsel for plaintiff.

The Court: Is there a witness room close by?

Mr. O'Keefe: I understand they have accommodations here for that purpose.

The Marshall: On the next floor below, or we can use the one across the hall.

Mr. O'Keefe: We don't especially care that they be kept in the room as long as they are out of the court room.

The Court: How many witnesses are there?

Mr. Robertson: In the main case——

The Court: On both sides.

Mr. Robertson: In the main case the government has about twelve or fourteen witnesses, and the defendant has already asked for some twenty or more. Now, your Honor, as far as the government is concerned, we have no objections to your segregating the witnesses, except this that we do want that rule to apply to the opposite witnesses as well.

The Court: Certainly.

Mr. Robertson: I might say this, your Honor would probably want to consider it in determining what to do here, and that is this that in the main case the government will probably not call more than one or two witnesses who have not testified twice in this case and the two records of whose testimony are here in court.

305 The Court: Well, let us find out how many witnesses are present.

Mr. Robertson: The government has a number of witnesses subpœnaed in anticipation that they may be used in rebuttal.

The Court: All the witnesses present who were subpœnaed on behalf of the government please now stand up.

(Witnesses stand.)

The Court: All of the witnesses present on behalf of the defendant will now stand up. There does not appear to be any.

Mr. Robertson: I would like, if your Honor will indulge me, to make a statement: upon the theory that the same defenses would be made in this case that have heretofore been made, the government has present certain physicians who were brought here for the purpose of testifying on any mental questions that might be raised, and those witnesses I would like to have remain in the court room for the purpose of observation—that is what they are here for.

The Court: I think they should hear the testimony, otherwise it would have to be all written out and submitted to them.

Mr. Robertson: It would be a great saving if they could remain

The Court: Now, who are those witnesses, who are they?

Mr. Robertson: Dr. Parry, Dr. Glasscock, Dr. Lindsay, Dr.
306 Schull, Dr. Coons,—let us see, who is the other one—Dr. Uhles.

The Court: Is that all?

Mr. Robertson: Yes.

The Court: You gentlemen now here may remain in the court room and hear the testimony on both sides. All the other witnesses present——

Mr. Kimbrell: By agreement, we except Mrs. Stroud and Warden Morgan.

Mr. Robertson: And the deputy warden.

The Court: All right. Mrs. Stroud and the Warden and deputy may remain. Now, as to all the other witnesses, counsel have requested that you be excused from the court room during the taking of testimony. You will retire from the court room to the room across the hall here, and remain there or thereabouts until you have been called as a witness in the case. You will not at any time enter the court room while the testimony is being taken. You will be notified when to come into court by the marshal or the deputy. Is the room across the hall convenient?

The Marshal: Yes sir.

The Court: Are there chairs in there?

The Marshal: Yes sir.

The Court: You will please go now to the room across the hall.

307 *Statement of the Case on Behalf of the Government.*

By Mr. Robertson:

May it please the court, and gentlemen of the jury:

As the representative of the government, gentlemen of the jury, it is the duty of the District Attorney at this time to state to you what the government expects to show by the evidence in this case, what the facts will prove and establish; generally, what this case is about. And in just as few words and with the use of just as little time as seems possible to me, I will do that for you. It is not my purpose, gentlemen, to take a great deal of time here and go into every minute detail surrounding this case, but to give you general ideas of what the testimony is, and you will understand that will be supplemented by all the details that necessarily follow in a matter of this kind.

You already understand that the charge set forth in the indictment is what is known to the law of the United States as murder in the first degree; a planned, premeditated murder, executed with malice aforethought. And that, gentlemen, is what I think you will find the testimony will show was done in this case.

The testimony will show that, of necessity, (and I think perhaps it is safe to say that as a matter of common knowledge you know already) in an institution such as a penitentiary there must be discipline, there must be officers; and there is in this, the United States penitentiary located in the county of Leavenworth, and near this

city, officers there for the purpose of enforcing the rules and discipline of the prison in handling the occupants, the prisoners, the inmates. And among the officers of that institution, those
308 engaged as officers of the United States, upon the 26th day of March, 1916, and for some time prior thereto, was Andrew F. Turner, whose title as United States officer was that of Guard. I believe at that time there were something like seventy-five guards, I am not sure about that number, handling possibly between fifteen hundred and two thousand prisoners. I have no accurate recollection now as to those details, that will take care of itself as we move along in the case. And there had been there in that prison for some years as an inmate, this defendant, sitting here, Robert F. Stroud. The 26th day of March, 1916, gentlemen, was Sunday. In that institution you will learn from the evidence that the men are kept in certain places or cell houses known as galleries, on certain galleries. The cell houses have many stories and tiers, known as galleries. Mr. Turner, the deceased, had certain duties, by which it was known where he would be, and the defendant, in company with other prisoners, had his particular cell where he was kept, and to which he would return when he had occasion to leave it, or was taken from it, for any purpose. And this arrangement was such, gentlemen of the jury, that the defendant would know where he would sit in the dining room that day; and he would know about where any one of the guards would be, and he would know practically where Mr. Turner would be. The evidence will show to you that upon this Sunday, at the noon meal while about twelve hundred men, convicts, were eating, and the band—they have a band there that plays when meals are served—and this band was playing music; and these men were being waited upon there as they were eating, for that is the way it is handled there; that the defendant Stroud gave a signal to Guard Turner, such as he had a right to do under the rules of the prison, which signal meant he desired to retire from
309 the room to the toilet room; he got up from his seat, I believe there were some six or seven, I believe about six sitting together in each seat, long rows of those seats, six or eight sitting together, I am not sure of the number; he sat pretty well over in the middle of one of those seats, Guard Turner out here; he gave his signal and Guard Turner consented he might step out and go about what he wanted to do; he got out in front of the other prisoners, started on his way, had gone but just a very short distance when the evidence will show that he stepped in front of Mr. Turner who was standing there with his club, the guards all carry clubs similar somewhat to what a policeman carries, and when not in use they stand with the club under the left arm; the evidence will show Mr. Turner standing there with that club under his left arm, and when the defendant Stroud got directly in front of him he turned and said something to him, and with his left hand—and he is left handed—as he stepped in front of Guard Turner took a knife out from under the lining of his coat, which was there in a leather sheath, a dagger, and at the opportune moment took the dagger out from under that coat and jabbed it into Mr. Turner, and went through his heart,

into his heart, at any rate he sank to the floor and in a moment was dead. The evidence will show you gentlemen of the jury Mr. Turner had no more idea of being killed than you have. There is some history leading up to this matter. The testimony will disclose, at least it will disclose enough of it so you will understand I think what it is; the testimony will show that on Saturday before that the defendant Stroud was violating the rules of the prison in talking, a thing they have no right to do without special permission, talking to those near him in the dining room; I think it was the Saturday evening meal before, and that Mr. Turner, as was
310 his duty to do, took this man's number; that is, he stepped up toward him and got his number. You gentlemen understand how these convicts go by numbers up there and not by names; Mr. Turner took this man's number, which meant, as the testimony will show, that he would probably be reported to the warden's office for disobedience of a rule of the prison. After the number was taken and Turner had stepped away Stroud made a remark to a seat mate to this effect, I cannot use the exact words, "If that fellow shoots me" the word "Shoot" in prison parlance meaning to report, "If that fellow shoots me" makes a report on me to the office "I will fix him." Gentlemen, at Sunday dinner the convicts wear a particular garment. They have a coat that they wear to that meal which Stroud wore in company with everybody else at that meal; and each convict has only one of those coats, and Stroud had only one of those coats. That Sunday coat, which is a blue military looking garment, which buttons about the person, has a lining in it, and is better clothing than they wear generally. After Stroud killed Mr. Turner the evidence will show he was immediately taken over to what is known as the isolation ward; that is a place in the prison where incorrigibles are kept. Stroud was taken there and his garments were taken off of him, and this coat that he was wearing was taken off of him and put in a locker, and some time later, upon examination, it was found that in the lining of that coat there was sewed a leather sheath in which that dagger was carried. You gentlemen will understand that under the rules of the prison no one has any right to have anything of that sort in his possession. The coat will be brought here with that sheath in it, and that knife that killed that man will be brought before you in evidence, and you will see that situation, and those things.

311 The evidence will show to you gentlemen of the jury that after Stroud was put in the isolation ward he talked to others about the commission of this offense, and how he had planned it, and why he did it, and the evidence will be sufficient to show you he cherished up a feeling against this man, Mr. Turner, whom he killed. The testimony will show that even after he killed him, when asked by one of the officers at the prison why he killed him, he said "He deserved killing, he was nothing but a dirty rat anyhow," and things of that sort. And gentlemen, after he committed this offense Stroud wrote certain communications, letters, which he desired to send out through the mail to people. Under the rules of the prison a convict there has not the right to write letters, the writting of letters is a mere

privilege, and when he writes them he has no assurance they are going into the mail, or going anywhere unless the warden or some of the officers of the prison deem it that he is entitled to the privilege of having them go out. Certain of these letters that he wrote were retained by the Warden and the other officers of the prison and turned over to the District Attorney's office and they will be brought before you for consideration, and from those letters you will be able, I think, to see something of the mind of the defendant in the commission of this offense, and you will be able to see that he regards it a great act of heroism on his part that stamps him as a superior among those of his kind, as he calls them. That will be the evidence.

Mr. O'Donnell: May it please the court, I suggest counsel is arguing his case at this time.

The Court: No, he is merely telling what will appear from these letters.

Mr. O'Donnell: Furthermore, we object to the comment on those letters, for the reason it appears from the statement of the
312 District Attorney, just made to the jury, and from the motion heretofore filed in this court, that those letters were obtained by the government violating the defendant's rights under the Constitution, the Fourth Amendment to the Constitution.

The Court: Objection overruled.

Mr. O'Donnell: To which we except.

Mr. Robertson (continuing):

Just in that connection, gentlemen of the jury, it probably will not be amiss to say to you, the testimony will show these so-called letters or statements the defendant wrote were never in the United States mail; the United States mail don't enter that prison or the prison grounds in any way; prison mail is all received in the building in which you are sitting, the postoffice building in the city of Leavenworth, received there and deposited there by special messengers. These letters, gentlemen of the jury, will show, when you hear them read and consider them, that the defendant not only regarded the commission of this offense as a great accomplishment on his part, and shows a great criminal egotism on his part, but it shows that he was willing to brag about it. Witnesses will be brought before you that will show just what these letters show; in his talk in the isolation ward after he committed this offense, in his talk to others that were confined there in that insolation ward, that he planned this offense, that he succeeded in committing it just as he planned it; that he figured out in advance that he would get his man so many inches from the breast bone; that when he did hit him he hit him right where he figured he was going to do, and that he hit him just exactly as he planned to hit him, that is what the evidence will show. The evidence will further show to you, gentlemen, that in all probability when the defendant committed this offense be believed that
313 the law of the state of Kansas applied to this case and he couldn't get more than life anyhow for it, and that he didn't care, the evidence will show that, the letters will show it.

Mr. O'Keefe: If the court please, we except to the statements of counsel in that respect.

Mr. Robertson (continuing:)

The evidence will show that was in his mind. He wrote these letters as I have said gentlemen of the jury expecting them to go out to certain friends of his he was in correspondence with, and they were being offered to those friends as narratives of what he had done, and in a measure explanations of what he had done and why he did it; and he said in certain of these letters that "I cannot tell you" this is the substance and effect, "I cannot tell you why I killed that man; that I will have to hold until I get my chance to tell it to a jury; my strength lies in keeping my mouth shut." That is what those letters will show that he wrote, and many many other things of like import and effect, gentlemen. I have not the time to go into the details and tell you all of them. His conversations with other prisoners in the isolation ward, were overheard, conversations that he had with others there right soon after he killed this man, the next night or two, were overheard by men who were working and occupied there; one of them was a negro who was serving a term in the prison, and was trusted there, a trusty; I think he had served terms in other prisons before he came there. There will be men employed there as officers, who were not convicts, who also heard these statements, and these men were not sent there to listen to Stroud, nobody had asked them to listen to him or anything of that sort, they just heard these things. And during the explanation that Stroud was making to one of his fellow convicts in there as to how he had planned to stab this man so many
314 inches over his breast, during the time he was explaining that to another prisoner whose name is Jones, I believe, as the testimony will show, that some one of the prisoners gave a signal across—there is a hall down through the isolation ward and prisoners are on both sides and look back and forth across from door to door across that hall, two rows of cells down there one on each side of the hall way, and look across those doors and see one another; and during that conversation one of the prisoners made some sort of a signal in the language they were using there, not understood by anybody that saw it or heard it outside of themselves; and that fellow said to another convict, I believe to Stroud or Jones, I don't know now, the testimony will show, "There is an ear out," and after that statement was made from one fellow to another, "There is an ear out," that was the last they heard of that kind of talk there between them. There was much talk however gentlemen among these men, with Stroud as the central figure, about this killing, and during the most of these statements and conversations that Stroud had they seemed to be entirely oblivious of the fact the guards were there, paid no attention to them at all.

Now there is another element that enters into this that I think is proper for your consideration, and that is this: I think the evidence will show that the killing of Mr. Turner was not only done by Stroud maliciously for the purpose of killing Mr. Turner on account of the feeling that Stroud had against him, but it was a stab and a blow at the discipline and organization of that prison. The evidence will

show to you that this man is entirely out of harmony with organized society——(interruption)

Mr. O'Donnell: If the Court please, we except to the statement of the prosecutor, for the reason——

The Court: That may be argument Mr. Robertson; if it is, you better defer it.

Mr. Robertson: It is not, Your Honor.

315 The Court: There is some evidence?

Mr. Robertson: Yes, Your Honor, evidence.

Mr. Robertson (continuing): And the best evidence in the world, I think, gentlemen of the jury, which is the letters, which will show you he had a hatred for the warden, he had a hatred for the trusty prisoners, for the guards, will show you that he had a hatred for the discipline, and that he had denounced them in these letters after he killed this man time and time again, and I do not believe this counsel ought to interrupt me with his frivilous objections.

Mr. O'Donnell: The defendant is charged with one crime and apparently the prosecutor seeks to have him punished for alleged hatred; we object and except to the remark.

The Court: I think not; I think anything that tends to show the criminal state of mind charged in the indictment is competent testimony; your objection and exception are overruled and may be noted in the record.

Mr. Robertson (continuing): And if there is any question about it, gentlemen, the rules of the prison will show, and these rules every inmate is required to know. It is his first duty to take the little book and read it and familiarize himself with it, and if he can not read the language to have it interpreted to him, and those rules show to him, and will show to you if there is any question about it, that a communication of any sort that is written by an inmate in that institution that pertains to or has to do with a crime, that it is the duty of the warden to prevent its going into the mail, or elsewhere than into the hands of the government, and therefore, gentlemen, these letters I have for the purpose of assisting you as the arbitrators and judges of the facts in this case, to understand what this case is about, and to understand the mind and motive

316 back of this offense.

That dining room, gentlemen is a large place and we will be able to introduce in evidence to you a picture of it that I think will give you a good idea of it, a picture of it that is accurate and reliable, drawn by a man up there in that institution; a correct description of the situation as it was on the day and moment that Stroud signaled to Mr. Turner to go out of the room; and that you will be able to see from the evidence and from this diagram that the guards were supervised there by a man who was then known as the Captain, Captain Purcell. He is now on different duty but he had been Captain for many years, he was known as Captain of the Guard. And it was his duty to see that the waiters went about waiting on

the men as they were eating, giving them what they may want, and see that they had plenty to eat, and all that; see the guards were in their places and everybody doing their duty. And Captain Purcell was at his post the moment this thing happened and saw the entire occurrence, and he went to the scene, which was quite a number of feet down the hall from him, as quickly as he could under the circumstances; he saw practically the whole thing, saw Stroud step out and saw the movement, and saw the deceased fall to the floor; and he went down there and he approached Stroud and took him away from that scene, took him by the coat sleeve, and Stroud then still had that dagger in his hand with the blood dripping off of it onto the floor; the Captain said something to him as they walked along about the knife, as I recall it; Stroud gave it a throw away off under some seats or tables or something, and it was picked up right then and there and Captain Purcel has had it ever since. Before Captain Purcell approached Stroud, seeing he had this dagger in his hand, approached him, as the testimony will show with a *a* good deal of caution and care, as I remember, in one instance, before he
317 did finally take him by the left coat sleeve, the hand that was carrying this dagger, stepped back away from him, but finally took hold of him. In discussing this thing in the isolation ward Stroud said, in discussing the matter and gloating over it, as the testimony will show, to his fellow prisoners, that he said there in discussing the matter, "That it was lucky for Captain John the he took precaution" or words to that effect, "or I would have got him too," something along that line is what he said, the substance of what he said although, gentlemen, I am not pretending to use the exact words. Captain John has been there ever since that prison has been there, and is still there, employed, however, now in a different capacity, and will come before you and testify about the matter; and I will introduce to you other witnesses, of course, who were near enough so they could observe this matter so that I believe you will be able to see just what the facts are gentlemen of the jury. Some of whom were convicts there, near to Stroud, and saw and heard what was said. These men who will testify gentlemen of the jury do not agree exactly on all the details; some say they heard this, and some say they heard that, and there will not be an exact agreement on details at all, but on the main facts which go to make up the case there will be no disagreement, in substance, and you will have no trouble I think to understand the main case. There was a band playing music, some of them say they understood Stroud to use an oath towards Mr. Turner; others say they didn't hear it; another will probably testify that he heard Stroud say to him "Did you report me"; another will say Stroud used an oath when he spoke to him before he stabbed him. Now, gentlemen, without going further into the details of this matter this is just a general outline of what the government's case will prove to you, and if it proves this situation, it seems to me it proves just exactly what the indictment charges, premeditated murder, executed with malice aforethought, murder in the first degree, for which the extreme penalty should be paid.

318 *Statement of the Case on Behalf of the Defendant.*

By Mr. Kimbrell:

May it please the court, and gentlemen of the jury:

I will state, without any bitterness I hope, without any unfairness,—I hope to state the brief story of this case from the standpoint of this prisoner here. He is here to show, and you see he is about twenty-six years old; he came to the federal prison here when he was nineteen, from Juneau, Alaska. And the evidence will show at the time of this killing of Guard Turner his mother and his sister lived in Juneau, ran a little boarding house there; and his mother was a seamstress and sewed for a living. Bear that in mind in connection with the letters the District Attorney has mentioned as having been written to her. The evidence will convince you, that, as a boy, being a widow's son, his education and advantages were limited, and when he came to this prison he tried to educate himself, and succeeded in a remarkable measure, I think you will believe. He took a correspondence course in the Agricultural college of Kansas in structural engineering, took a course in language and literature, and was doing the best he could to so improve himself that when he became a free man, out in the world, he would be fit to do something worth while in the world's work. But a year or two before this killing he became afflicted with what the Physicians call Bright's Disease, and perhaps due to confinement, perhaps to despondency, his unhappy situation, perhaps in some measure to hard study, he became weak, sick, and spent a great deal of his time in the hospital. I think you will believe that from the evidence in this case.

319 I think the evidence will show that he knew but little of guard Turner; that Turner was a California man, or western man, like himself, who had been a guard down at Atlanta, Georgia, and for some reason had been removed from that institution to Leavenworth. The evidence will show you that all that Stroud knew about Turner was that his reputation was, at Atlanta and here, that of being high tempered and dangerous when in temper; and all he knew about him was that at Atlanta he had so punished a boy that the boy had subsequently died. That is, the evidence will show that this man Stroud knew Turner's reputation as a man to be dreaded, to be feared, as a man to be most implicitly obeyed by a prisoner, and I think the evidence will show you that he had no malice whatever against Turner, that he was there in the even tenor of his way, getting along the best he could as a prisoner. Studious, in bad health, as I have said, but making the best of his surroundings. When he was brought from Alaska he had a brother, Marcus Stroud, who was a boy then eleven or twelve years old, and from the time that Robert was brought here to the time of this killing, that boy had grown to be an erect young six-footer, eighteen or nineteen years old, and had come down to Kansas City to take a course in the automobile school, his intention being to go back to Seattle and from there on take up

that line of industry. Bear in mind now Stroud had not seen him for three years; once, in passing through from the old Illinois home the boy being thirteen years old, had stopped and seen him for a short while; that had been the only visit he had had with him since he left him a little lad at home up in the Northwest. On Saturday the brother Marcus had called at the prison with some cookies and cake, some fruit, and sought to see the brother he hadn't seen for three years; but he was late; Marcus knew nothing about the prison
320 rules. He left the simple little articles of fruit and cake there for his brother and went his way, leaving word, I think you will believe from the evidence, he would be back Monday. Of course Robert Stroud was anxious to see that boy. When he got to his cell that Saturday evening he found these little articles of fruit and cake there with the boy's name, Marcus, written on it, and he had the hope of seeing him Monday. Now th evidence will be, as disclosed by Mr. Robertson, that the rules of the penitentiary, and the rules in force to the guards, are strict, perhaps must be severe, exacting, trying. The evidence will disclose, perhaps, being somewhat excited, knowing his brother had been there and had gone without seeing him, for some reason, at the supper table that night this man spoke a word to a companion at his side. I think the evidence will disclose there was no complaint of the substance of it, but of the fact, under the circumstances, he had spoken to a companion at his side a simple word, there was complaint, and guard Turner came around quietly and took his number, which meant he would "shoot him," and that in prison parlance is what they call "reporting," which meant in the mind of Robert Stroud that he would be sent to some sort of confinement or punishment if the report went through, if it was acted upon, and that when his brother come he would not get to see him; he wanted to argue that simple question with Guard Turner. I think you will believe from the evidence that these prisoners who have been pardoned by the government in order they may testify, you will notice, gentlemen, the kind of temptation it is to testify against this defendant to have their pardon, it influences their testimony. One of them a Doctor Burton will testify as they moved away from the
table Stroud said "If he shoots me I will attend to him" or
321 something like that. I think you will believe from the evidence offered by the defendant that all Stroud said was, "If he reports me I won't get to see Marcus Monday and I want to talk to him about it" or something of that kind. I don't believe that you will believe from the evidence that there was any complaint, any threat against Turner, any though in the mind of this defendant of injuring Turner at all, but he did want if he got the opportunity to lay before Turner the fact of his brother's visit, that he desired to see him Monday, apologize, perhaps, for his slight infraction of the rule, speaking a simple word to the man at his side, and not have that report go in. That is all there is to that. All through this testimony you will notice this, that when a guard drops out a word in favor of this defendant at one trial, he don't go on the stand the next; and the prisoner who testifies incriminating him are men who have had par-

dons handed to them. And another thing has cropped out in the trial of this case; the government stood here with free pardon in hand to prisoners who testified against this man, but when we sought to have prisoners brought to say a word in his favor, the government locked the doors by the objections of the prosecuting attorney. I mention that to say, the zeal of the prosecution in this case leads to some unfairness in this case.

Mr. Robertson: If the court please, I object to the statement of counsel for the simple reason it is absolutely untrue and he cannot produce any record on earth to show it.

Mr. Kimbrell: That you handed pardons to these men right here in this court room, and that when we sought to bring prisoners here to say a word for Stroud, you objected. That is absolutely true.

Mr. Robertson: And another thing; I think, perhaps, I better reserve this statement, your Honor, that I am about to make, and ask permission to make a reply statement, and I will answer counsel at that time.

322 Mr. Kimbrell: All you have to do is to look at the record of the trial or the decision of the Supreme Court of the United States. And I mention that simply to show the zeal which characterizes the prosecution, and prosecutors are not infallible any more than defendants; they have their faults just as the defendant on his side has, and sometimes in the conduct of the trial. I mention this as evidence of the spirit of unfairness in dealing with the defense in this case, in trying to explain that which happened in a minute and in the presence of fifteen hundred men; some of them saw a little, many saw nothing at all.

Now the evidence will show upon going to the Sunday dinner Robert Stroud had on the customary clothing, and that he did have a knife which he had made out of steel; they were building up there, and worked in carving woodwork, the evidence will show that. And he took a bit of steel, not being allowed a tool of any other kind, and he made himself a knife, and he carried that knife; the evidence will show even in shaving, if he cut his nails, that is what he had, and he did keep it concealed, he couldn't have kept it any other way. But we believe, gentlemen, under the instructions of this court, whether he was wrong in complying with the rules or not, in having a weapon, when he killed Turner, if Turner was about to kill him, however wrong in having the weapon, he had the right to use it to save himself from death or grave bodily harm. If you believe, under the instructions of the court, you may be carrying a pistol along the streets at night, but if a man tried to rob you (interruption)——

Mr. Robertson: Your Honor, I object to that as being simply argument.

Mr. Kimbrell: I think the court will so instruct; I men-
323 tion that as the rule applicable to certain facts in this case. That he had the knife, it was a violation of prison rules there can be no question; the evidence will be that he had the knife long

before Mr. Turner left the Atlanta prison and was brought up here. We mention that not in criticism of Mr. Turner, at all, because it happens to be a fact in the case he was a stern and exacting guard; he had had this misfortune it is said in his official life which made his reputation such this prisoner, and others, far from seeking any controversy with him, dreaded any controversy with him, and it was only this visit of the brother, only this report because he spoke to his fellow prisoner Saturday night, only his desire that that report not go through and deprive him of the chance to see his brother Monday, only that that caused him to have indicated to the Guard that he wanted to stop on the way to the closet to stop and speak to him about this thing. The evidence will be he stopped to speak to Guard Turner. "Will you report me." So the evidence will on the part of the defendant tend to show, such as we can get. "Yes, I did." And then there was some argument about it, an effort of this boy to explain why he didn't want to be in punishment Monday but wanted to see his brother, a request that he withdraw the report; a loss of temper by Turner; an application by Turner to him of the vilest name that one human being can apply to another on this earth; an effort by Turner to reach for his club, and drawing his club, the evidence will show, this defendant seized this club with one hand. The evidence of Guard Beck who was on the stand at the first trial, but not the second, if he is here for the government this time, will be that he heard the noise between these men when back at the rear and walked up where they were, while in the controversy, and that he saw Robert Stroud with both hands holding that club that Turner was trying to use on him. And you believe from that man Beck's
324 testimony, if he is put on by the government and he testifies as he did at the first trial, that there was a controversy beween the two men, Turner lost his temper, was abusing this man, that perhaps this boy got mad, that he did try to hold the club with one hand, then with two; and you will believe from that, if that is true, that if he was holding that club with both hands he had no weapon in his hand; he drew his knife, he stabbed, he fought, but he drew that knife after he let the hand loose of Turner's club. Now that will be the testimony of Guard Beck if he is put upon the stand; if we have to put him upon the stand, we are bound by what he says: if they put him on the stand and he don't tell that, we will show by his prior testimony and record, that he swore away back at the first trial, he heard the controversy and walked up to where they were, some twenty paces or so, and those men were quarreling and struggling over that club, and later, we believe, the stabbing was done. If we prove those things, gentlemen, you will not believe that this boy, Robert Stroud, planned in cold blood and premeditatedly killed with malice, this man, but that if he did, it was simply because there was no other defense, nobody else protected him, having tried to hold the club with one hand, then with two, and finally drew the knife out, that he had no right to be carrying, and he used it; but if he used it even to keep this guard from beating him up with that club, you will find, under the instructions of the court, he had a right to do it. You will believe from the instructions of the court even a prisoner is

still possessed of some rights, the right to keep a guard from taking a club and unnecessarily punishing him.

Now, we will prove, we will have it from some twenty prisoners—we cannot promise any pardons to those fellows—they are out there, prisoners; we will put such of them upon the stand as will give you any light in this case, and we think they will show you what
325 Guard Beck said was true; that there was a struggle between these two men, a verbal controversy; that they later got mad; that he tried to use his club unnecessarily; that this man tried to prevent the guard injuring him, and couldn't do it, and then the stabbing.

Another thing, gentlemen, you will find he did write letters to his mother; he wrote letters knowing full well that not one would ever see the light of day until the prison officials out there had looked over every word and decided whether it would go out or not. He knew of some prisoners who looked at it from his standpoint, some guards that he thought did, like Beck, like Whitlach. He didn't mention their names, as he said, but tried in those letters to conceal his defense; he didn't want to mention that any prisoner would say this, or any guard say that, because he felt they would be in some way influenced and would not testify for him. And he wrote his letters with an effort to disabuse his mother's mind out there in Alaska, and his friends also, and always wanting to conceal, for a reason you will believe is good, his real defense from the government officials. You will bear this in mind: That under the instructions of the court, it matters not what he said in those letters the purpose of concealment, or otherwise, that if he was a criminal there, as he was; if he was talking to this guard as he had a right to do; if the guard lost his temper and tried to use his club; that he, as a human being had a right to defend himself, and that is his defense in this case. And we ask your patience to follow the testimony in this case.

Now, as to Tyson, a colored man, who testified he heard Robert and a man named Jones talking across the hall to each other that night, I want you to observe this in Mr. Tyson's testimony, and Mr. Brown's, and, bear in mind, we will prove this; there was a man named Jones across the hall who was an inmate of the federal
326 prison and had killed another prisoner; bear in mind, that man Tyson who testifies to this conversation, put the very words into Jones' mouth that he tries to put into Robert's mouth in this case. I think the testimony will show that he attempts to recite what? What is his testimony, and what is his repetition of it? And I think you will believe this is true; the man has memorized a story and the only way he can tell it is to begin at the beginning and recite it through to the end. He cannot commence at the middle and tell you any fact. Every time we ask him to recite it he commences at the first and recites it to the end. I want you to observe this, because this man was a prisoner there, not like a man outside. Watch it closely, and you will believe these things are true. That this guard did have a club; that this man did try to control him with one hand, and then two, and failed, and afterward stabbed him. And if that is true there is no first degree murder or no second degree murder

even if there is no self-defense because a man that is assaulted and in a passion cannot commit murder; it is the result of the passion, and not of any malice, and there has to be malice in murder. But I believe you will believe from these facts that you will glean, from something dropped here and there by a guard, from something dropped out here and there by a witness for the government who may have been a prisoner up there, and know from that this boy struck this blow unfortunately but in self defense.

Mr. Robertson: We desire to make a reply statement, Your Honor.

The Court: I think you better leave it to the testimony. A general outline is all we need; the jury will settle any differences. Call your witnesses.

327 To prove the issues made by the indictment herein and defendant's plea thereto, on the part of the government, the following evidence was introduced and offered :

JOHN M. PURCELL, called as a witness on the part of the government, being duly sworn, testified as follows:

Direct examination.

By Mr. Robertson:

Q. What is your name?
A. John M. Purcell.
Q. Where do you live?
A. At the corner of 13th and Kiowa, Leavenworth, Kansas.
Q. Are you an officer of the government, Mr. Purcell?
A. Yes sir.
Q. What government officer were you on and prior to the 26th of March, 1916?
A. Captain of the watch, at the United States penitentiary.
Q. How long had you been Captain of the watch?
A. About seven years.
Q. How long have you been a government officer connected with the United States penitentiary at Leavenworth, Captain?
A. Since September first, 1895.
Q. Was that the date of the establishment of the prison?
A. Yes sir.
Q. Previous to that time, were you, in some capacity, connected with Fort Leavenworth?
A. Yes sir; I was a soldier at Fort Leavenworth, Kansas, at the United States Military prison.
Q. And were you familiar with the Fort Leavenworth Military Reservation?
A. Yes sir.
Q. And know where it was situated?
A. Yes sir.
Q. You have been, all these years?
A. Yes sir.

Q. Were you acquainted with the defendant, Robert F.
328 Stroud on the 26th day of March, 1916?
A. Yes sir, the same as all the rest of the inmates.
Q. You knew he was there?
A. Yes sir.
Q. Knew who he was?
A. Yes sir.
Q. Did you see the occurrence there which this case has to do with?
A. Yes sir.

(A large framed picture was here marked by the government's stenographer, Miss Elizabeth La Bar as Exhibit 1.)

Q. I call your attention to a picture or diagram that has been marked here by the court stenographer, Miss La Bar, as "Exhibit 1" and ask you to look at it, Captain?
A. Yes sir.
Q. Have you seen that before?
A. Yes sir.
Q. Did you see an occurrence there on the 26th of March, 1916?
A. Yes sir.
Q. What was going on in the dining room at that time?
A. The men were engaged in eating, and the waiters were passing the food along through the aisles.
Q. Is this "Exhibit 1" a correct description of the situation there—a correct picture of it, as the situation was at the moment that Stroud signaled Guard Turner there to leave his seat?
A. Yes sir.

Mr. Robertson: I offer in evidence Exhibit 1.

"Exhibit 1" as identified by the stenographer of the government was then received in evidence.

Q. Now, Captain, I wish you would take that stick (indicating) and come over this way; (the witness here left the box and took a position in front of Exhibit 1) kindly indicate on this Exhibit 1 where you were seated at the opening of this occurrence?

(The witness indicates with the pointer.)

Q. What did you call this position?
A. Deputy Warden's station.
329 Q. Where were you sitting?
A. I was sitting in that station.
Q. Were you in position to see all that was going on?
A. Yes sir.
Q. Do you have music at meal times?
A. Yes.
Q. Was there a band playing at that time?
A. Yes sir.
Q. Explain to the jury what sort of music you have—did at that time?

A. A brass band—brass music—I don't know what piece they were playing.

Q. What day of the week was it that this happened?

A. On Sunday, about the noon hour.

Q. What was going on in the dining room?

A. The prisoners were engaged in eating, waiters were passing to and fro and passing food, and guards were passing two and fro—one would pass half way through this way, and the other would pass half way through the other way (indicating).

Q. Explain to the jury, in your own way, just what you saw there and what occurred in relation to the defendant Stroud and Guard Turner?

A. I was seated in the stand, and in the position that I was seated, I could overlook the hall, all the tables. The stand was probably 18 inches or 20 inches higher than the tables. I noticed Guard Turner, in passing up and down the aisle here he stopped, as it seemed, in this position here, and Stroud raised his hand—there was a man raised his hand, at first I didn't know who it was—and Turner bowed like that. Turner had on his spectacles, and he kind of looked over them, and bowed in that manner, and the man stood up.

Q. Do you know what that signal meant—explain about that?

A. It meant that the man desired to go to the toilet, to step outside—that he was not feeling well—something like that. They invariably asks the guard, and when they came up by the stand they would signal the captain in charge, and pass out wher-
330 ever they were going, and Mr. Turner, as soon as he nodded to him, he had his club under his arm and he started walking down the line here; Stroud came out and Mr. Turner got this far down the line and he turned. The guard on the other end came up to about the fifteenth table on that line and as soon as he turned Stroud came out and stood before him. Mr. Turner was standing in about this position (indicating) and Stroud spoke to him, and Turner kind of looked over his glasses, Mr. Turner bowed like that and looked over his glasses, and then Stroud spoke to him again, and I watched what was going on. I thought it was unusual and all of a sudden Stroud made a move like that, Mr. Turner moved this hand, his right hand in this manner, and I got up and stepped down like that. Stroud grasped the club with the other hand, stood there and looked at it a moment, let go of the club, Turner tipped forward like that and fell alongside of the table.

(No page 289)

The Court: Let the witness sit down now, or do you want him at the map?

Q. Have you a club here?

A. Yes sir.

Q. Have you it where you can produce it?

A. Yes sir.

Q. Now explain to the jury what further happened between you and Stroud, indicating on the map?

A. I got up from the stand and I moved down to where Stroud was standing.

Q. Speak a little louder, Mr. Purcell?

A. I got up from the stand and moved to where Stroud was standing, and as I passed down here (indicating) Mr. Smith was on the opposite side, and I turned my head sidewise for Mr. Smith to come over, and he came over and passed through here (indicating)—the seats. Mr. Smith whispered and he said to me, "Look out for the knife." I just had almost got to Stroud then, and he held a knife in his left hand and there was blood on the knife and blood dripping off the knife. I nodded to Mr. Smith like that; stepped up to Stroud and put my hand on his arm and asked him, "What is the matter?" He said, "You stand back!" I said, "Let us go outside and talk this matter over." And I said, "What is the trouble?" He says, 'I asked that man a civil question.' "

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Mr. O'Keefe: If your Honor please, I insist on your Honor's ruling; if he is going to use this map, all right, but if he is not, he should take the stand.

The Court: Yes, resume your seat.

Q. You have the club with you now?

A. Yes sir.

(Witness produces club, wrapped up.)

The Court: Sit down, please.

Mr. Andres: Before the witness, your Honor, unwraps the club, would it not be very well if he describes it?

The Court: He says—I understand the witness says he has the club that Turner had on this occasion. (To the witness:) Is that what you do say?

A. Mr. Reno got this club from under the body.

Q. Did you see him pick it up?

A. No sir.

Mr. Robertson: If counsel make any question about it, let me hand it back to Mr. Reno.

Mr. Andres: There is a question about it, however.

Q. Have you got the knife with you?

A. Yes sir.

Q. How did you get it?

A. After I had spoken to Stroud and walked up the aisle with him, he took the knife and threw it under one of the benches, and a prisoner in there kicked it out with his left foot, and I picked it up.

The Court: Speak a little louder.

A. As soon as I took Stroud by the arm, and we went up through the tables, and he threw the knife under the table and a prisoner kicked the knife out like that from under the table and I picked it up.

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Q. Is this the knife that you have now handed to me?
A. Yes sir.

Mr. Robertson (to Miss La Bar, the government's reporter): Will you mark it in some way?
The Court: It cannot be marked.
Mr. Robertson: I offer that in evidence as "Exhibit 2."

(The knife identified by the witness was received in evidence and exhibited to the jury.

Q. What, if anything, was further done by you in relation to Stroud or Mr. Turner?
A. I turned him over to Guard Limmer and he took him to the isolation ward.

The Court: Do the jurors on the far end hear the witness? (To the witness:) Speak up.

Q. I wish you would explain briefly to the jury what you mean by the isolation ward?
A. The isolation ward is a building with about twelve or fourteen rooms. The rooms are about eight feet wide and twelve feet long. They are used for to place a prisoner in when he becomes refractory or anything of that kind, he is placed in there and will remain in there until whatever disposition is made of his case,—for different infractions of the rules, that is.
Q. State, if you know, what was done with Mr. Turner?
A. He was taken to the hospital. Guard Smith took charge of Mr. Turner and had his body taken to the hospital.
Q. This all happened within the United States penitentiary at Leavenworth?
A. Yes sir.

Captain, you may state, if you know, whether that peni-
333 tentiary is located wholly upon the Fort Leavenworth Reservation?

A. Yes sir.
Q. It is?
A. Yes sir.
Q. Are you familiar with the customs and rules of that institution?
A. Yes sir.
Q. If you will, I wish you would explain to the jury what is done in relation to furnishing all inmates with copies of the rules of the institution?
A. Each inmate, on his arrival, is taken and photographed and taken to the various offices and afterwards taken to the Deputy Warden's office for assignment; and the deputy warden brings him in and gives him a copy of the rules, and gives him a tobacco card, a writing card and a cell card—whatever cell he is given, and he is taken to the cell and assigned to that cell unless there is somebody in it and in the near future that a change comes. They change cells various ways there.

Q. State, if you know, what the various rules are about a convict having a knife or weapon such as Exhibit 2 here?

Mr. O'Donnell: That is objected to; if they are competent at all, the rules themselves are the best evidence.

Mr. Robertson: I don't want to take up the time with them. I have them here.

(At the request of Mr. Robertson, the document last referred to by him was marked by the government's stenographer as Exhibit 3, for identification.)

Q. I hand you a booklet that has been marked "Exhibit 3": state if you know whether that is the book of rules that was in force at the time of this occurrence, March 26, 1916?

A. Yes sir.

Q. At your institution?

A. Yes sir.

Q. And did the defendant have a copy of that in his possession?

A. Yes sir.

334 Q. State if you know what his number was in that institution?

A. 8154.

Mr. Robertson: I desire to offer in evidence Exhibit 3.

Mr. O'Keefe: I desire to ask him a question.

Mr. O'Donnell: If the Court please, we object to the introduction of these rules, because it is wholly immaterial what the rules were—because it is wholly incompetent, irrelevant and immaterial.

The Court: Let me see them.

(Exhibit 3 passed to the Court.)

The Court: What rule did he offer in evidence, Mr. Stenographer?

Mr. Robertson: I did not give any rule, your honor. I will have to look at the book to tell.

(Mr. Robertson examines Exhibit 3.)

The Court: I think the objection at present is good, Mr. Robertson.

Mr. Robertson: I don't believe I understand what the objection is.

The Court: As incompetent, irrelevant and immaterial.

Mr. Robertson: May I ask if that is upon the theory that it is not properly identified as the rules of the prison?

The Court: No: I think it is properly identified.

Mr. Robertson: I desire to offer, then, out of Exhibit 3 sections 15 and 16, pages 8 and 9.

Mr. O'Donnell: Let me see it, Mr. Robertson? (examines Exhibit 3) I object to it as incompetent and immaterial.

335 The Court: I think the objection is good at present.

Q. State, if you know how defendant was dressed at the time of this occurrence, that Sunday noon?

A. He had on a dark blue coat and trousers, and his coat buttoned.

Q. I will ask you to state to the jury, if you know, Captain, how many such coats defendant had?

A. All prisoners are only issued one coat.

Q. Is that true of this defendant?

A. Yes sir.

Q. Was he wearing the garment that he properly should wear at the Sunday noon meal?

A. Yes sir.

Q. What, if anything—Tell the jury, if you know, whether that garment bore his number?

A. Yes sir.

Q. It would?

A. Yes sir.

Q. You are, I take it, entirely familiar with the cell houses and galleries, and the position that Guard Turner would occupy there, and the prisoner Stroud in that institution—that is, you know what cell house he occupied, the defendant?

A. He was on D cell house.

Q. I wish you would explain to the jury—this is the point I want to get, and as briefly as you can, just whether the defendant could know where Mr. Turner would be at that time, and if so, why? Explain to the jury.

Mr. O'Donnell: That necessarily calls for a conclusion.

The Court: No, I think it calls for facts.

Mr. O'Donnell: The question is whether he did know—all right, I withdraw it.

A. He would have a good idea where Mr. Turner was, judging from his detail in the cell house.

Q. Explain to the jury how that can be true?

A. For instance if he was on the third—the second gallery
336 on D, that would be about five or six aisles from here; that would necessarily on Sunday throw him on the third section from the south side of the dining room or from that side (indicating) —during the day, during the noon meal there were men out at work in some of the other different rooms, and that would throw the men over on the other side; but in the evening they would all be in the sections. It shifts a little from one side to the other according as the men were out at work or all in the dining room.

Q. On that Sunday evening was Guard Turner at his regular position?

A. Yes sir.

Q. And was Stroud in his regular position, where be belonged?

A. Yes sir.

Q. Did you see anything of the occurrence on the day before, between Guard Turner and Stroud?

A. Just simply saw Guard Turner speak to him; it was on Saturday evening, just spoke to him and then went on moving up and down the aisle. He leaned over and spoke to him.

Q. State, if you know, to the jury whether it is permissible for a prisoner going out under these circumstances to stop and talk to the guard?

A. No sir; after he once gets permission, he steps out of his place in the seat, comes right up the aisle and salutes, makes a motion with his hand, then passes out of the dining room to the toilet or wherever he is going; and they are not allowed to leave the dining room except they become sick or go to the toilet.

Q. If a prisoner has a complaint to make of any sort, explain how that may be done, if you know?

Mr. O'Keefe: That is objected to as incompetent and improper.

The Court: What do you mean by "complaint" Mr. Robertson?

Mr. Robertson. That is, if he wants to complain of the
337 action an officer has taken in the prison, or wants to explain anything, or wants to be heard in his own behalf on any matter, that is, explain how he should do it.

The Court: Do you mean to inquire of this witness if there was a well understood custom in the institution among the inmates as to when and where and in what way complaints are made?

Mr. Robertson: That is exactly it—yes sir.

The Court: Put your question in somewhat different form—I don't think it calls for that.

Q. I adopt the remark of the Court and I ask you to answer that, if you know?

Mr. O'Keefe: I don't think that is a fair proposition; the Court didn't put his remark into the form of a question.

The Court: Are you attempting to show, on this *oc-* occasion that the defendant was making a complaint?

Mr. Robertson: No sir.

The Court: What is this for? It seems to me it is wholly disconnected.

Mr. Robertson: It may possibly be that it is not relevant yet, at this stage of the case.

Q. State, if you know, or have observed, as to whether the defendant is left handed, or not?

A. Yes sir.

Q. He is?

A. He is, yes sir.

Q. In what hand was he carrying the knife at the time this happened?

A. The left hand.

Mr. Robertson: You may inquire.

The Court: We will suspend now, Captain. I wish you would take the knife and put it in the enclosure. Has everybody
338 seen it?

Mr. Robertson: I think so; I saw counsel with it.

The Court: Then let the Captain keep it. We will suspend, now,

until two o'clock. Now, Mr. Marshall, what about taking care of this jury?

The Marshall: I will take care of them.

The Court: What kind of sleeping quarters can you get—comfortable?

The Marshall: Yes; I can put—do you want them all in one room?

The Court: I want to know what kind of arrangements you are making or can make?

The Marshall: I think I can make arrangements for one or three rooms.

The Court: Can you get a large room that is airy, with cots?

The Marshall: I can try—I believe I can.

The Court: I want you to try to make them comfortable. Now, have you arranged for their meals?

The Marshall: I have not as yet.

The Court: Where do you usually take them—to the hotel, or can you get some place that is more private?

The Marshall: We usually take them to the hotel.

The Court: Is there a place there where they can be rather to themselves?

The Marshall: Yes sir.

The Court: It is pretty trying, gentlemen of the jury, for twelve men to be kept together and especially in this kind of weather.

A Juror: It sure is.

The Court: This is a character of case where it is thought to be proper you should be kept together. If the quarters that the
339 marshall provides are not as comfortable as you think might be had elsewhere, or other arrangements might better be made, you can make your complaint here, not to the Marshall. I will do the best I can to begin with. If they are not satisfactory then we will take it up and try to make other arrangements. Now, the only purpose of this rule requiring you to be kept together and separate and apart from anybody else grows out of the fact of the importance of the case, and the necessity of your not gaining any impressions about it aside from what you hear in Court. If you were permitted to separate and go about the City, you might,—not due to any fault of your own,—hear remarks or read something in the paper that would lodge in your minds and prejudice you against the defendant or against the government, that you would not be able to free yourself from when you came to determine what your verdict should be. You might think it didn't affect you or influence you, and yet, notwithstanding your impression to that effect, it might have some bearing upon what you should do. We cannot always tell, any of us, how far we are influenced, sometimes, be even idle remarks, and how far even false reports in newspapers go to lead us to a fixed conclusion. Is it the practice to swear the ba-liffs, when they take charge of the jury?

The Clerk: Yes.

(And thereupon two deputy marshalls were sworn and the
340 jury placed in their care and custody.)

The Court (to the Jury): You gentlemen remain in your seats until the audience retires, and you will go in the custody of the marshall and get your dinner.

The Court will now recess until two o'clock.

And at 2 o'clock p. m. of the same day, the Court again convened and the trial was resumed and the following proceedings had:

JOHN N. PURCELL, recalled as a witness on the part of the Government, for further examination testified as follows:

Cross-examination.

By Mr. O'Keefe:

Q. Captain Purcell, this Exhibit is supposed to represent the dining room, is it?
A. Yes sir.
Q. Now, this is your seat here?
A. Yes sir.
Q. What is the length of that dining room, from the east side clear to the west side, or from here to there (indicating)?
A. I should judge about 260 or 270 feet.
Q. 260 or 270 feet?
A. Yes—possibly more.
Q. What is the width of the dining room from the north side to the south side?
A. Well, probably about 150 feet—100 to 150 feet; those tables are sixteen foot long; there are five sections; there is about eight foot space between each one of the sections—probably 140 to 150 feet.
Q. Just answer my questions; I think we will get *get* to it quicker——
A. Yes sir.
Q. This room, as I understand you, lies east and west, just like the room we are now in?
A. Yes sir.
Q. And the entrance to the room is from the east side into the room?
A. The entrance is on the east side—the southeast side, for the men to march into the dining room.
341 Q. Catch my question—the entrances, more than one, are all on the east side of the room?
A. No sir; they are on the southeast side of the room—the entrances for the men to march in.
Q. Is there an entrance on the north side of the dining room into the kitchen?
A. Into the kitchen—yes sir.
Q. And then there is an entrance from the alcove on the south side of your desk, is there not?
A. South?
Q. South?
A. The east side—southeast.

Q. In other words, you have the entrance here into the cooking room, and an entrance here where the prisoners march in?

A. Yes sir.

Q. Then there is a small entrance right back of the deputy warden's stand?

A. There is an entrance there.

Q. A small entrance?

A. Yes sir.

Q. Now is there any other entrance into the room?

A. There is on the northeast—the southeast and one on the east.

Q. In other words the partition across the east end of the room is not a direct line, like that?

A. No sir.

Q. It comes in a sort of alcove?

A. Yes sir.

Q. Now, is there any outlet from this room to the north or to the west—to the west or to the south?

A. No sir.

Q. So any prisoner or any person in this room leaving the room must necessarily come forward?

A. Yes sir.

Q. And pass on either side of you?

A. Yes sir—no sir, only on the southeast side.

Q. They are not permitted in the kitchen at all, except those men employed there?

A. No.

Q. The cooks and others come in on the northeast corner of the room, do they not?

A. Yes sir.

Q. Now, I notice a guard standing prominently here in this cut?

A. Yes sir.

342 Q. I will ask you how the tables are waited upon and by whom?

A. They are waited upon by the prisoners assigned for that purpose.

Q. Now, take a single row—take just one side of that row, how many prisoners are employed constantly during the mean time going backwards and forwards feeding these men?

A. There is five men to each side of the section—about five, and if there is a little extra there is six men on each section—on each side.

Q. Now, where do these—there would be five on this side of the north section?

A. Yes sir.

Q. And five on the south side of this section?

A. That would depend on whether the section was filled out; if there was eight or ten tables that there was not waiters sitting there, there would probably be several prisoners taken off.

Q. Let us get that—this particular Sunday—this particular meal, was this section full?

A. Except a little portion on the end.

Q. How is that?
A. Except a little section on the end, two or three tables.
Q. Was this second section full?
A. Yes sir.
Q. Was this third section full?
A. No sir.
Q. How many seats were vacant in that third section?
A. I should judge about twelve or thirteen.
Q. And the rest of it was filled?
A. Yes sir.
Q. And this fourth section?
A. That is the second section; the sections are numbered from the south side to the north side.
Q. Let us go back then; take this south section, was that filled?
A. Yes sir.
Q. The second section, was that?
A. Yes sir.
Q. The center section?
A. No sir; there were about twelve or fourteen tables
343 vacant.
Q. Do you know definitely how many were vacant?
A. No sir.
Q. This next section?
A. Full—yes.
Q. And this section?
A. Possibly there were a couple tables vacant there.
Q. Now then, after these men, prisoners, were seated there, the waiters come from the northeast corner out into the room do they not?
A. No sir.
Q. How is that waiting done—tell the jury?
A. They come from the west side of the dining room, or the further end—they are lined up there in a column of twos, and wait until they are all seated and at a signal from the head cook they start out with their bread or meat or whatever they have in their waiters; they come up and start waiting on the tables—so many come up to the south end and commence waiting from the front and others start at the lower end and serve on each side. The men that are distributing bread they pass in and out through the northeast corner of the dining room to the bread room and they have a tray and the bread is placed on that tray and they come out and distribute the bread along the tables.
Q. Now, let me understand you; before these men, the prisoners, are seated at the tables, all the men that supply them are brought back to this west end and held there?
A. Yes.
Q. Now, do any of the waiters go through that west end to the cooking room during the meal?
A. Not until they are through distributing the food or whatever they have, for instance if a man has got meat and has served his section and they are all through and have got sufficient, he goes

back to the west end of the dining room, leaves his waiter there, and he has a strap that is attached to that waiter, and he unbuckles it from across his shoulders and passes into the kitchen for the other work he has to do.

344 Q. Does he then remain in the kitchen?

A. He does; he is supposed to stay in there until they march out of the dining room except a few that come out to clean the tables after they have marched out.

Q. What I want to know; there seems to be some part of the prisoners that keep coming and going through these different aisles out into the cooking room—what are they doing?

A. The men that are carrying the bread pass in and out of the bread room, to get the bread.

Q. To get the bread?

A. Yes sir, to get the bread and distribute it.

Q. Take a single aisle, how many seats to a single aisle here?

A. In length.

Q. How many men are seated at one of these tables?

A. Six.

Q. How many tables from the front end to the back end?

A. 42 tables, I believe.

Q. That would make something like 250 men to a single column or aisle?

A. Yes sir.

Q. Now when these men start at the west end, or back end offering the food, how many of them come up say, in one single aisle?

A. Five—the, five on each side.

Q. They start clear back at the end, do they not?

A. Some do, and some commence at the front end and start back.

Q. Now, do they have to go back more than once to refill their dishes?

A. Sometimes, yes sir.

Q. So that, during the meal there is constantly men going backwards and forwards to the west end to get additional food?

A. Yes sir.

Q. That would make—you say there is only five to a side?

A. Yes sir.

Q. There would be five to that side?

A. Yes sir.

Q. That is ten men?

A. Yes sir.

345 Q. How many guards walk backwards and forwards?

A. They vary according to the number of guards you have.

Q. Now wait a minute—there is one guard who is at the west end, is there not?

A. There is one guard—the head cook is at the west end.

Q. Aside from the head cook, there is one guard in the west end?

A. In the section, yes sir.

Q. Then another at the front end?

A. Yes sir.

Q. Does each one of the two come the entire length of the aisle?
A. No.
Q. There would be two in the aisle?
A. Two and three guards in the section, as the case may be, if you have the men to put in there.
Q. What do you call a section?
A. The interval between tables—the space between tables or interval.
Q. Now on this date how many guards were in this particular aisle between the second and third row?
A. Two.
Q. How many waiters were in there?
A. Well, constantly—well, I should judge there were about eight.
Q. Eight or ten?
A. About eight.
Q. And these eight men were going backwards and forwards?
A. Yes sir; they were walking alongside the tables, serving the food.
Q. Now, you were seated up overlooking your charges, just like the judge is upon his bench there?
A. Yes sir.
Q. How many men in all were seated there in front of you?
A. Prisoners?
Q. Yes, at that time?
A. Oh, I should judge about a thousand men.
Q. A thousand men?
A. Yes sir.
Q. That would make at least two hundred to each of these five rows?
A. Yes sir.
346 Q. And the men who supplied all these prisoners, they came from the back end forward and went back again, did they?
A. They walked along the side of the tables and distributed food from their waiters.
Q. Now, I will ask you if it is not a fact that these men started in at the west end after getting the food and walking along here—and the first one gives what to the prisoners?
A. That depends upon what instructions they get from the head waiter.
Q. Do they give them water?
A. They give them water.
Q. The first man gives water?
A. Not always the first man water.
Q. What does he give?
A. Potatoes or tomatoes or whatever they have.
Q. What would he have these potatoes in?
A. They have an iron waiter.
Q. About this size?
A. Yes sir.
Q. A steel dish?

A. Yes sir.
Q. He gives potatoes to them there, does he?
A. Yes sir.
Q. After that, what does he do?
A. Then he goes to the next table.
Q. And furnishes there to them?
A. Yes sir.
Q. How does he furnish there—to each of these men?
A. To three of these six men.
Q. That is, on one side?
A. Yes, for the man on the other side would furnish, would give potatoes to these over here.
Q. To the others—to these three?
A. Yes sir.
Q. Who would the next one be?
A. I don't know who he would be or what he would have—I could not say.
Q. You say there would be five in the line?
A. No, I didn't say there would be five in the line?
Q. How many would be in line?
A. They would not be in line. There would be three of the
347 men that would be at the other end, waiting on the other side of the tables.
Q. Coming down from in front?
A. Yes sir, coming down from in front.
Q. And when those three would give out whatever their vessels held, they would have to turn back to the back end and get more food?
A. Yes sir.
Q. And then come up here where they left off?
A. Yes sir.
Q. So they are constantly walking up and down that aisle?
A. Not constantly—there are men walking along distributing food.
Q. Where were those guards, when the prisoners in that supper hall were going up and down feeding these other men?
A. Where were they?
Q. Yes sir?
A. Five or six of them were scattered around the hall, along these 42 tables.
Q. Five or six scattered over the hall, along these forty-two tables?
A. Yes sir.
Q. And this one guard has charge of those twenty-one tables?
A. Twenty-one—yes sir.
Q. And who has charge of the north side of those twenty-one tables?
A. He has charge of both sections; he walks along the interval down there.
Q. In other words, he takes care of that side here and that there as he goes down?

A. Yes sir.

Q. And the one on this side to the right, as he walks down, has to keep out of the way of the *rp*isoners here, feeding these men?

A. Yes sir.

Q. And out of the way of those on this side?

A. Yes sir.

Q. In other words, there is always a movement up and down during the meal time?

A. Not in the center; that center is reserved always for the guard.

348 Q. Now, the center, between the north side of that middle aisle and the south side of that middle aisle, is how much space?

A. Probably twelve feet—ten or twelve feet.

Q. Is it that much?

A. I never measured it.

Q. Wouldn't it compare more with the space between the desk here and the end of the jury box, say?

A. With, say, the end of the chair.

Q. The end of that chair and this here?

A. Yes sir.

Q. So that if—these prisoners that feed all the prisoners carry back and forward a large box, don't they?

A. Not very large, probably 16 inches each way.

Q. And necessarily they would have to stand out part way from the tables as they were going along?

A. They don't distribute it that way; they stand with the vessel in front of them. They pass along with the vessel in front of them.

Q. And the others right back of them?

A. No, they are not right back of them.

Q. Don't they give the men their food in regular order; one gives them water and one coffee——

A. There may be an interval of twenty feet between them.

Q. They try to supply the prisoners at this end with the food for the meal?

A. Yes sir.

Q. One gives water?

A. Yes sir.

Q. One coffee?

A. Yes sir.

Q. And one meat?

A. No, the man that carries the coffee or water is the same man. They have the coffee in a regular pocket that he has on.

Q. They have them separate?

A. No sir.

Q. How do they give water?

A. They carry the water the same way—first they go with
349 the coffee and then if they want water they bring that along.

Q. They don't ask a man if he wants water and then go clear back for it?

A. No, if a man wants water they bring that later.

Q. Now what is in the vessel, the 16 inch vessel?

A. When they have meat, the meat is in there.

Q. And they first pass the water and then next time they give water to those that want water?

A. The next time. The man that is serving on that side of the aisle, if he has not enough meat, so that it won't go around there, he gives out the portion that there is there, and he passes to the next man and then to the third man, and then goes back and then the second man that failed to get meat, then that man gets his meat.

Q. After the meat is served, then you have potatoes, do you not?

A. Yes sir.

Q. How far from the man with the meat would the man with the potatoes be?

A. That man would be about ten feet, probably, behind him.

Q. Then after that do you have milk?

A. The man that serves the coffee serves the milk.

Q. This coffee man comes and the meat man comes, then what else do you serve?

A. Then there is bread.

Q. Then the bread man comes,—does he follow—is he in line?

A. He is not in line; he passes along afterwards, and distributes.

Q. Then what else do you have?

A. That depends on what they do serve that day.

Q. You have simply coffee, bread and meat?

A. And potatoes——

350 Q. So that these men pass up and down through the entire meal?

A. No sir, there is intervals of ten or twenty feet—sometimes there is twenty feet as they pass.

Q. Now, when this man has given all of his meat out, he may not have gotten down to the east end?

A. No.

Q. What does he do?

A. He walks down to the side of the hall and goes back to the west end for more.

Q. In other words, while the other waiters would be occupied by serving these men, this fellow that just finished would be coming up again here—is that right?

A. No.

Q. Is not it the regular order for this man who has finished to step outside of that line and come down?

A. Yes.

Q. What did they do on this particular day?

A. I could not say, just on this particular day; I presume they carried out the same method that they always do.

Q. Now, while the men on this side were feeding these men, you have another set on this side feeding these men here, do you not?

A. Yes sir.

Q. And they are moving backward and forward in the same way, are they not?

A. Yes sir.

Q. And when they get to the end they have to turn and go back to the back end, don't they?

A. Yes.

Q. Now the guard comes from the back end down to the center, does he not?

A. Yes sir.

Q. And that is the way it happened on that day, did it not?

A. Yes sir.

Q. Now, as he comes down, he has to observe what is happening on either side, does he not?

A. Yes sir.

Q. Now, how many of these guards did you have on the North side,—on the south side, rather? That is number one on this, is it?

351 A. I think there were two guards there.

Q. And there were how many waiters on the south side?

A. About five or six.

Q. About how many guards did you have on this second aisle, on that day?

A. There were two—Mr. Subencamp and Mr. Dixon.

Q. How many waiters did you have on that second aisle on that day?

A. I think there were about ten waiters on that section.

Q. Ten walking backward and forward, were they not?

A. Yes sir.

Q. How many waiters did you have on the north side of this number two aisle on that day?

A. Probably about five.

Q. Five?

A. Yes.

Q. How many guards did you have on the north side—on that south side of three on that day?

A. South side of three?

Q. That (indicating) would be the south side of three, would it not?

A. There were only two guards in the section, in the space between there, in the aisle.

Q. How many waiters did you have on the south side of three that day?

A. I should judge there were about nine. The section was not filled out.

Q. Do you know accurately?

A. No sir; I should judge from the number of empty tables there—there were about twelve or fourteen vacant tables, and that takes off a couple of the waiters.

Q. How many on that north side, that day?

A. Probably about the same amount.

Q. How many?

A. Eight or nine.

Q. How many on the south side of Four?

A. That is, in the aisle—nine, I think in that aisle.

Q. How many in this next aisle?
A. Probably ten or twelve.
Q. How many on the north side?
A. There were five.
352 —. In other words, there would be about seventy men altogether, would there not?
A. About sixty.
Q. About sixty men?
A. Yes sir.
Q. How many in addition to these waiters did you have back filling these dishes?
A. Sometimes two or three.
Q. You were up here in front?
A. Yes sir.
Q. You were up as far as the judge is from that wall to the front end of these seats?
A. No, not that far.
Q. How many feet would you say that your desk is from the front end of these seats?
A. Oh, about twenty-five feet.
Q. About twenty-five feet?
A. Yes.
Q. Twenty-five?
A. Yes.
Q. Now, then, that is sitting where the judge is and starting back to the front end of these five columns here (indicating)?
A. Yes sir.
Q. You would be overlooking a thousand men or more, would you?
A. Yes sir.
Q. And you would be overlooking how many guards in there?
A. That depends on how many guards were in there—twelve—or ten.
Q. There would be at least two to each aisle, would there not?
A. There were not on that day.
Q. Why not on that day?
A. We didn't have them to put them in there.
Q. In addition to these twelve guards, you would be overlooking how many men in lines—how many waiters?
A. About, probably sixty waiters in the hall.
Q. About sixty waiters in the hall?
A. Yes, divided; there is five aisles, and twelve men in the section, and that would give you the full limit of those.
Q. Was it your duty to overlook the whole thing at one time?
353 A. To overlook the dining room—I could not see the whole thing at one time.
Q. Could you distinguish—could you tell us now who was guard at the west end of the third aisle on that day?
A. On the third aisle, that was Boyer.
Q. Who was guard on the west end of this fourth aisle?

A. On the fourth aisle,—let me see—I can't remember his name; Smith and Boyer were on the third.

Q. Who was here at the front of the fifth aisle?

A. There was one man—only one—on the fifth aisle. Moore and Kettle were on the first aisle, and Dixon and Subencamp were on the second aisle——

Q. Now, just wait a minute—answer my question; who was here at the front end of this fifth aisle?

A. I can't recall his name.

Q. What prisoner sat right next to Stroud on that day?

A. White—J. P. White.

Q. What prisoner sat right opposite at the end of the row, immediately north of where Stroud was on that day?

A I don't know.

Q. Do you know or can you place one single prisoner in this third aisle on that day, or where he sat?

A. I could not recall them now.

Q. Can you place any single prisoner on this fourth aisle that you say contained something over two hundred men on that day?

A. I could not place them now. I would have to find out what section they were, and I could tell exactly what cell room they were in and I could give a pretty good idea where they would be seated.

Q. Can you place any single prisoner that was in this fifth aisle on that day?

A. I could place a lot of men that belong down in the parol rooms or trusty rooms, that was down at the further end.

354 Q. Now take the men who were in this second aisle—the one that you say Stroud was in—can you now identify or say who sat two seats back of Stroud—two seats to the west?

A. No, because they change frequently, and I could not tell who they were.

Q. Can you now say who sat five or six or seven seats back of him, on either side?

A. I could not tell them now.

Q. Did this man have any headgear on?

A. No sir.

Q. Did they have any identifying marks, as hats, or anything of that character on?

A. No sir.

Q. From where you sat, there on that day,—take for instance the judge's bench—your seat would be about as high as the judge's there, wouldn't it?

A. Yes, about that high.

Q. From there, taking a look back there over forty-two of those tables, could you see anything more than the heads of those men?

A. I could see the faces.

Q. How is your eyesight?

A. Pretty fair.

Q. Do you wear glasses?

A. For reading purposes.

Q. Take fifteen seats back from that in which you are, can you identify a man?

A. I could identify a man down in the last section, if he raised his hand—I could tell who he was.

Q. The raising of hands is of constant occurrences?

A. Yes sir.

Q. How many men on that day raised their hands and went out of that room at that particular meal?

A. Stroud was the first man on that day, to ask to go out—Stroud was the only man that raised his hand—the others were made to go out after the occurrence.

Q. What portion of the meal was it that Stroud raised his hand?

A. Well, they had been eating about fifteen minutes.

Q. Do you say, Mr. Purcell, it is your duty to see each of

355 these prisoners raise their hands?

A. My attention is attracted to them when they raise their hands.

Q. Do they raise their hands to you or to the guard in the aisle?

A. To the guard in the aisle.

Q. Do you have any particular reason, when they raise their hand to the guard in the aisle—do you communicate with those men sitting back there?

A. Do I communicate with the guard?

Q. No, to the men?

A. No, not unless there is a man right close and the guard is away and they look toward me and I nod for them to come out.

Q. This man was back how many seats?

A. Fifteen seats.

Q. And this guard had twenty-one seats to look after, on that day?

A. Yes sir.

Q. From where you sat on that day, do you now state to the jury that you saw that man raise his hand when he first raised it?

A. I saw that man when he first raised his hand.

Q. Did you know in advance who he was?

A. Not until he raised up in his seat.

Q. Was there anything out of the way in his raising his hand?

A. No sir.

Q. Did he raise it and wave it or anything, or how?

A. No, he just raised his hand, like that.

Q. Where was Turner when that hand was raised?

A. Well, he was just about one seat this way, in his section, from him.

Q. One seat this way?

A. About one seat in the middle of the aisle.

Q. Then if Stroud was back here in the 21st table——

A. Fifteen tables.

Q. Or fifteen tables, then he would be just one table nearer to you, would he?

A. Who?

Q. Turner?

A. No, he would be about fourteen tables—he would be at the fourteenth table.

356 Q. Now wait—have you got Stroud in the fourteenth or fifteenth table?

A. Yes sir.

Q. Where was Turner when Stroud raised his hand?

A. He was passing down the aisle about opposite the table where Stroud was sitting.

Q. Which way was he going?

A. Going east—no going West.

Q. West?

A. Yes sir.

Q. He went back there about twenty tables?

A. Yes sir.

Q. And he had walked down here about to the 14th table when Stroud raised his hand?

A. Yes sir.

Q. He was that close to him when Stroud raised his hand?

A. Yes sir; he was about, if you stood there and Stroud was about where that third juror was, and you were there, and he raised his hand.

Q. If I was at this end of the table and that man raised his hand?

A. Yes sir, if that third man raised his hand.

Q. And he raised his hand to the guard?

A. Yes sir.

Q. Where was the waiters at that time?

A. They were passing along distributing food.

Q. When Stroud raised his hand—the third man here—to the guard, what was done?

A. The guard went right over and stood near the table and leaned over neat to the table and looked over his spectacles and nodded his head.

Q. Then, as I get you, Stroud raised his hand—the third man in—and the guard came here, the guard went here and spoke to him here, is that it?

A. Yes sir.

Q. Then after he spoke to Stroud there, what did the guard do?

A. He just started down, and walked down the aisle.

Q. How far had he walked down the aisle?

A. I judge six or so tables.

357 Q. From about here?

A. Not necessarily six; sometimes they don't walk the full length of the tables—sometimes they walk halfway down and turn around—sometimes; then again they would make a shorter trip.

Q. How many tables did the guard then walk after he had spoken to Stroud?

A. Oh, probably three or four tables, and then made a turn.

Q. Then after he had spoken to him he went down here three or four tables and made a turn to come up?

A. Yes sir.

Q. What did Stroud do?

A. He got up and went out and two or three steps to where Turner had turned around and started there to speak to Turner.

Q. What was the man doing while the guard was walking away after having given Stroud permission to get up and he walked down these three or four tables?

A. About three tables or four, maybe.

Q. He walked down about three or four tables and then turned to come back?

A. He walked down three or four tables and then turned to come back, yes.

Q. And during that time what was Stroud doing?

A. Stroud had got up as soon as he nodded to him, and as Mr. Turner turned away, he started to get up, like this and he could not get out there while the other men were seated, and the other fellows on the seat stood up and Stroud got out in the aisle.

Q. Did they both meet here?

A. Who, Stroud and Turner?

Q. Yes?

A. No, Stroud stepped out and met Turner as he was coming back in the aisle.

Q. Do you mean to say, then, that while Stroud was getting up from the third seat here, and coming out, Turner had gone down there four or five tables——

A. No—no.

358 Q. How many?

A. About three tables.

Q. And turned and came back?

A. Turned around and was coming back.

Q. He had not got back there yet?

A. No, he just turned around and was starting back when Stroud met him.

Q. But Stroud met him when he was coming out here?

A. He met him three tables away; it is as if Stroud was here and went down to where you are standing.

Q. You mean to say that Stroud left his seat there and came out here to the end——

A. Yes sir.

Q. And then turned and walked this way, to the west?

A. He didn't have to turn; he just came out and started down to meet Mr. Turner.

Q. That is, facing that way, was it not?

A. He would be facing north and turned to the west.

Q. Then he came from that seat, that third seat, and came out here in the aisle, then instead of walking to the east where he was supposed to go, he walked west, did he?

A. Took a few steps west and met Turner.

Q. How many of these tables would you say he went west?

A. Probably about three.

Q. How many feet is one table from the other?

A. I believe one table is about sixteen inches, and there is a space of about eighteen inches for the seat, or something over that—probably twenty inches.

Q. Sixteen and twenty would make thirty-six, would it?

A. Yes.

Q. That would be three feet from the front of this table to the front end of that table?

A. Probably—yes.

Q. Then Stroud, after getting up out of his seat, he walked back there six feet?

A. Probably about six feet.

Q. Would you say it was six or seven or five feet?

359 A. Between six and twelve feet—well, between one and twelve feet would probably be the best limit.

Q. You would change then your opinion—how many feet would you say he walked back and to the west?

A. He walked back until he met Mr. Turner.

Q. How many feet would you say he walked back?

A. Probably about six feet or seven feet.

Q. About six or seven feet?

A. Yes sir.

Q. That would take him from this line here to about here, and his face was toward the chair was it not?

A. No, his face was toward the west.

Q. Could a man go out sidewise this way in between those tables—wouldn't he have to go out with his face toward the front or toward the back?

A. I stated that he waited until the other prisoners got up and let him pass them, and as soon as he got out in the aisle he started toward the west.

Q. Did these men get out of the way?

A. Partly.

Q. They stood up in their seats?

A. They did.

Q. And he started right down the aisle, and stepped down and met Mr. Turner?

A. As soon as he got out here he turned and went west.

Q. And went west about six feet?

A. Yes sir; that is where the talking was.

Q. You saw that where you were up in the front end?

A. Every bit of it.

Q. Watched the whole thing?

A. Watched the whole thing from the time it started.

Q. How far out in the aisle did he meet him?

A. How far out in the aisle did he meet him—it was probably a little more toward the section on that side—a little more toward the third section.

360 Q. Now then, to use this plat here, when Stroud left his seat here, he went out in the aisle and walked west six feet?

A. About six feet, yes, and met Turner about where your pencil is there—a little further toward the north—a little further.

Q. Toward the center—and that is where this trouble occurred?

A. Yes sir.

Q. Six feet back of where Stroud was sitting?

A. Probably about six feet.

Q. And there was nothing at all to interfere with your seeing it from where you sat here?

A. Nothing whatever.

Q. There was no prisoners or waiters in this aisle here, the north side?

A. There was no prisoners or waiters in that section there—that is where those twelve or fourteen empty seats were.

Q. Was there on this side here?

A. Here there were people.

Q. That was pretty well filled there?

A. No, they were stretched all along the line.

Q. Now, when Stroud left that seat and turned west this six feet, he stood in front of Turner?

A. Yes sir.

Q. Would Stroud have his face toward you or his back—tell the jury.

A. He had the right shoulder—would be toward me, Turner was kind of facing him a little south and east. He was facing Turner looking north and west about.

Q. In other words, when he came out——

The Court: I don't think you need repeat that, Mr. O'Keefe.

Mr. O'Keefe: All right.

Q. Now, when they met there, which was nearer the south side of the aisle?

A. Why Stroud was—the south side of which aisle?

Q. Of the second aisle?

A. Stroud.

Q. And Turner was in what sort of position?

A. He was facing a little south and east.

361 Q. What was the first thing that you saw occur between those men when they were facing each other in that way?

A. I seen Turner look over his spectacles, like that, at Stroud, then I saw a quick move.

Q. That is the first thing you saw?

A. Yes sir.

Q. And that occurred immediately after they met each other?

A. As soon as Stroud spoke to Turner.

Q. Nothing else occurred—they didn't wait there and talk or anything of that kind?

A. Stroud spoke to Turner and Turner looked at Stroud like that, over his specs, raised his hand to me like that, and turned deathly pale. Turner raised his hand to get his club like that and he kind of wavered and got hold of the club with his hand and Stroud got hold

of the club with his right hand and looked him right in the eye and he let go and Turner pitched forward on his face in the aisle.

Q. Now you say Stroud didn't catch hold of the club?

A. I said he caught hold of the club.

Q. Let me finish—you say that Stroud didn't take hold of the club until he had plunged, that way? Is that what you say?

A. He struck first and then got hold of the club afterwards when Turner raised his hand to me before he took hold of the club; reached his hand over and got the club and he waivered and the club went down in his hand. I could see him waver and he held the club like that and Stroud got hold of the club and held it and looked him right in the eye as he let go of the club and Turner pitched forward and fell in the aisle.

Q. Where were you when that occurred?

A. I was standing up in the stand, getting ready to come out to go down there, after Turner made a movement to me.

Q. Was there anything unusual that attracted your attention before Stroud made that quick move, to attract your attenuon to them?

A. The fact that Sroud went down the aisle to talk to Turner, instead of going, passing up the aisle where he was supposed to
362 go out.

Q. That is what attracted your attention?

A. Yes sir, mostly, it was after he got up.

Q. You were standing, you say, now?

A. I stood up as soon as Turner motioned me and started to go down to meet with Turner.

Q. But you didn't stand up until Turner motioned you?

A. No sir.

Q. Then you were sitting down at the time *at the time* of this lunge—not standing up?

A. Yes sir.

—. Now, after you saw the lunge you saw some break for the club?

A. Turner reached his hand around to take the club—he had it under here. He reached his hand around to get the club like that and he wavered and grabbed with both hands and Stroud got hold of the club, watched him in the eye a few moments and then he let go and he pitched forward and by that time I had got there.

Q. Now, Mr. Purcell, you say that the club—say that I would represent Stroud and you Turner, and we were facing each other, just as you and I are——

A. Yes sir.

Q. You being Turner?

A. Yes sir.

Q. And you say this man walked down and all of a sudden give a lunge?

A. Yes sir.

Q. While the other man was standing there?

A. Yes sir.

Q. What did that other man do—stand up and illustrate that right back here?

A. Turner had the club under his arm about like that, about in that position.

Q. Suppose I am Stroud now?

A. About standing there in this position; Turner had the club under his arm and he *m*ind of looked over his specs at Stroud like that, and Stroud made the lunge and he motioned to me, like that, and then he done like that and Stroud grabbed the club and held it there and looked him right in the eyes, and as soon as he let go, Turner pitched forward.

363 Q. And you could see him look him right in the eyes from where you were?

A. Yes sir—every bit of it—yes sir.

Q. And there was nobody in the way at all?

A. No sir.

Q. Now then, when the body fell, it still fell back of where Stroud had been sitting, did he?

A. About in the line with the tables.

Q. Now then, you then left your seat here and went down, did you?

A. Yes sir.

Q. And who was in the aisle when you started to leave your seat?

A. In which aisle?

Q. In this aisle of this difficulty.

A. I saw a guard, I think it was Mr. Whitlatch, coming up here from the other end.

Q. He was down at the west end?

A. Yes, I seen him and some of the other guards, coming up. I kept a watch on Stroud as I was coming down there.

Q. Did you go directly?

A. I stepped right around the aisle, just the same as if I came around this way and went down the aisle.

Q. Go ahead please; and tell us what occurred or what did you do—anything at all?

A. A little further down, Mr. Smith was on the opposite—on the fourth section——

Q. That would be this section here?

A. No he was in the aisle about the fourth section, and he looked up and seen me going down, and he looked up and I done like that. He started across through the tables. By the time that he got through, Turner was lying there; and he said to me, "Look out for the knife," and I seen the knife with blood on his hand and all over the knife, and I done like that.

Q. Did Stroud stay there after that?

363 A. Yes, he stayed there *there* until I got down there.

Q. He still had the knife in his hand?

A. Yes, he still had the knife in his hand with the blood running down the knife, and he said to me, "Stand back."

Q. He didn't stab you or try to?

A. He told me to stand back.

Q. That was the second time?

A. No, the first time. I got down there, and I asked him what was

the matter. He said, "I asked this man a civil question." I said, "What is the matter; let us go out and talk it over." He said, "You stand back." He had the knife like that and I placed my hand along his sleeve there and drew my hand down there.

Q. Did he make any effort to strike you?

A. No, only he told me to stand back. I knew what he meant.

Q. Did you get close enough to put your hand on his arm?

A. Yes sir.

Q. Did you put your hand on his arm?

A. In a gentle way.

Q. He didn't attempt to strike you?

A. No sir, he told me to stand back.

—. What did you do then?

A. I said, "Let us go out and talk this over and see what is the trouble."

Q. And he walked out with you?

A. Yes sir.

Q. He was not trying to conceal the knife?

A. He didn't try to conceal it—he did try to conceal it until—because he threw it under a table.

Q. He threw it under the table? You knew that he had the knife all the time?

A. Yes sir; and he held the knife until he got out into this next section and he threw it under the table, and a man kicked it out and I picked it up.

Q. Did you say anything to Stroud or did he say anything to you on the way out?

A. No sir; only I asked him what was the matter; I said, "Let us go out and talk this matter over, and as soon as I got to the
365 end of the aisle I called Mr. Lemmer and I said. "take this man over to the isolation."

Q. Yes—that is all that was said, was it, between you and him?

A. Yes sir—after the first—first, he said, "I asked this man a civil question;" then he told me to stand back.

Q. How many others were around there at that particular moment?

A. I never looked to see—I could not say whether there were one or a thousand men there—I don't know.

Q. Did the different guards come up?

A. Mr. Smith came across and a few men, quite a few men had helped to carry Mr. Turner out.

Q. What is the rule of the prison in regard to these clubs that these guards carry—are they supposed to use them on anybody except in self defense?

A. That is all.

Q. They are not supposed to hit at a man or strike at him except in self defense, are they?

A. That is all—yes sir.

Q. Now, when you saw Turner trying to get his club, you naturally though he was trying to get it for self defense?

A. My impression was that—yes sir—that was after Stroud had struck him that he started to get the club.

Q. Now, Mr. Purcell, you now say that this blow occurred immediately—was there any length of time that the men stood there talking before this occurred?

A. Mr. Turner was coming up the aisle from the west; Stroud met him, stepped right up to him, and Turner looked over to him like that, Stroud first spoke to him like that, and then he made the drive. Whatever interval of time that took, I could not say—it was just a moment.

Q. Do you remember testifying on the first trial of this case?

A. Yes sir.

Q. And on the second?

A. Yes sir.

Q. Do you remember testifying on the first trial of this case, from where you were you saw the men were "fussing"?

A. Well, I did—yes; it looked that way to me.

366 Q. How?

A. It looked that way to me.

Q. And they were fussing?

A. What we would term "fussing."

Q. Well, where did that fussing come in, as you now remember it?

A. We would call them fussing when the prisoner went down there and was talking to the guard—they had something between them, trouble—the man turning there and going in the direction that he did instead of going the proper way to the outside.

Q. You now say there was no fuss between them?

A. Well, talking between them, we call that fussing.

Q. Is it any unusual thing for a prisoner to talk to a guard when he goes out of the room?

A. It is an unusual thing for a man to go out of his regular course and talk to the guard.

Q. Isn't that a regular thing, for a prisoner to communicate with a guard?

A. They sometimes raise their hand—if they want to retire; they have no business having any controversy with the guard at all—they could not have; if they have any controversy, they must come to the deputy warden's office in the first instance.

Q. Is there anything unusual for them to talk to the guard as they go out?

A. Might say where he was going.

Q. They sometimes say where they are going, do they?

A. Yes sir.

Q. It is necessary for them to tell the guard where they are going?

A. If they raise their hand and the guard nods to him, a nod at the time he raises his hand, he may come out and say "I want to go to the toilet."

Q. As a matter of fact, Mr. Purcell, is it not true that when Stroud raised his hand to the guard, the guard, instead of being near that west point was away up here near the front end of that aisle?

A. I don't know—the guard—no, I say the guard was
367 talking to Mr.—Was talking to Stroud and bending over him like that, and at the table close to him, nodding his head like that.

Q. You now say that when Stroud first spoke to the guard or raised his hand up, that the guard was just one seat in front of him?

A. Well, that probably would be one seat in front of him—yes sir.

Q. As a matter of fact, was not the guard clear up at the end of the aisle?

A. Not when I say him speaking to Stroud—no sir, no.

Q. And didn't this controversy between them occur east of where Stroud was sitting and nearer toward you?

A. No sir; no sir; no sir.

Q. Now you have just stated here that the guard carries this club or weapon only to be used in self defense?

A. Yes sir.

Q. You remember on the second trial of this case, testifying as follows: "Question; Is there any rule that a prisoner wanting to go out shall not go out in the aisle to speak to the guard? Answer: There is a rule, if he does he is liable to be punished. Question: Why is he liable to be punished? Answer: The guard is liable to misunderstand him and strike him."—Was that question asked you and did you give that answer upon the second trial?

A. That would depend upon the conditions, with the man coming up and talking to him—that is as to the frame of mind the man was in when he came up and talked to him.

Q. The guard would strike him?

A. In self defense, if the man struck at him, he would strike him in self defense. No guard is permitted to strike a man except in self defense.

Q. Do you know of any guard that has struck a man in that institution, within six months?

A. No sir, I don't.

368 Q. Within a year?

A. No sir.

Q. Within two years?

A. I don't, no sir.

Q. Is that guard supposed to carry or wear his weapon to use it upon prisoners in that dining room?

A. He is not supposed to use it except in case of self defense, if a man strikes at him.

Q. Do you remember of guard Turner having trouble with a little colored fellow, knocking him down in the aisle, about two or three or four weeks before that?

A. No sir, nothing occurred like that, not during the time Guard Turner was there.

Q. Were you on that chair there continuously for two or three months before that?

A. Yes sir.

Mr. Robertson: I hardly think that counsel should talk so that the jury could hear them.

(It appearing that defendant's counsel were speaking in a partly audible tone to each other.)

Mr. Kimbrell: We were just reading a bit of testimony.

Mr. O'Keefe: It is not done intentionally, and we will be more careful.

Q. You remember being a witness upon the first trial of this case, I believe you said?

A. Yes sir.

Q. Did you, on the first trial of this case, in describing this occurrence, in answering a question, say this: "I suppose he stepped down ten or fifteen feet, walking down toward the middle of the dining room, and he turned and came back, and Stroud stepped down and met him. He stood there talking to Turner; Turner was looking at him and he nodded to Stroud and Stroud was evidently speaking to him."?

A. Yes sir.

Q. Then they were talking there before any act of any
369 kind was had?

A. Stroud spoke to Turner and Turner nodded his head like that, and then Stroud struck him—now that was the occurrence.

Q. Did you answer—what I want to know is this: did you, upon the former trial of this case, testify as follows: "I suppose he stepped down ten or fifteen feet, walking down toward the middle of the dining room, and he turned around and came back and Stroud stepped down and met him——"

A. Yes sir.

Q. "He stood there talking to Turner?"

A. Yes sir.

Q. "Turner was looking at him, and he nodded to Stroud and Stroud was evidently speaking to him."?

A. Yes sir.

Q. Then it did occur—there was a conversation there?

A. Just merely as I explain it now, and that is what I meant when I gave that testimony; the thing that occurred was Stroud speaking to Turner and Turner nodded his head like that, and then the blow was struck.

Q. And you were seated at your desk at that time, one hundred feet away?

A. About seventy-five, as I measured it.

Q. Did you on the first trial of this case, in answer to a question, also make this statement: "After Turner left here and walked down here, Stroud had passed those two men out and came down here and met Mr. Turner, and stood talking to him, and Turner stood facing him in the same position I am now, and Mr. Stroud was a little off this way, and evidently talking, when the fuss was made"—did you so answer upon the first trial of this case?

A. I answer, "yes"; to that; but the identical meaning of that is the same as I state now, in that chair.

Q. You heard guard Beck's testimony on the first trial of the case?

A. No sir.

370 Q. Or on the second trial?

A. No sir.

Q. Where is Mr. Beck now?

A. I have not any idea; he is a member of the guard force up there, but I have not any idea where he is just now.

Q. When you used the word, "fuss" on the first trial of this case, and testified that occurred between the prisoner here and the dead man, what did you mean?

A. We consider—especially in this case—where a man leaves his seat and goes from the proper direction he is supposed to go, he has some matter that he wants to talk over or some question that he wants to ask, and we call it a fuss; for instance, if a man should have some difficulty about his food and wanted to make a complaint about his food, and if he should go to the guard, we would call it "fussing," about it.

Q. A guard would not be justified in knocking a man down for an ordinary conversation?

A. I have never seen a guard strike a man in that dining room at all for anything like that.

Q. A prisoner has no reason to expect a guard to strike him under ordinary circumstances, has he?

A. Except he goes to strike the guard, and then the guard is fully justified to protect himself.

Q. That is a rule of the institution, is it?

A. That is a rule of the institution.

Q. And that is known to the prisoners as well as to the guard?

Q. Yes sir—yes sir.

Q. Now you spoke of Stroud having on what sort of a coat that day?

A. He had a dark blue suit, a uniform suit of the prison; that is, dark blue pants and dark blue coat.

Q. As a matter of fact, had not Stroud worn that same coat during other meals that week prior?

A. He is supposed to wear it at every meal from probably the first of October until about the latter part of April; then

371 there is an order issued for them to wear their jumpers during the week days, and on Sunday there is an order issued for them to wear their shirts in the dining room, the table service.

Q. Now this coat that he was wearing on that day, did he not wear that coat during the previous week?

A. I presume so, and ever since it was issued to him; he had been wearing it at every meal.

Q. I understood you once to say, Mr. Purcell, that this coat that he had on on this Sunday, he only wore on Sunday?

A. No sir, no sir; he only got one coat to wear. During the summer season he is allowed to lay his coat aside, and go in his shirt sle-ves.

Q. Now then, how long this knife had been in that coat, you don't know, do you?

A. I didn't know it was in the coat.

Q. As a matter of fact wasn't there eighteen or twenty prisoners wearing knives at that time?

A. Not to my knowledge.

Q. You have found it out since, have you not?

A. I have, yes sir; they are not permitted to carry a knife; if they are found it is always an indication that they intend to injure some body, and they are taken from them immediately.

Q. Those prisoners use those knives to shave with, don't they?

A. I never saw one shave with them.

Q. Did you know that this man shaved with this knife at times?

A. He had plenty of opportunity to get shaved without using that knife.

Q. You don't know whether he did or not, do you?

A. I don't know whether he did or not. I don't think he did; I don't think that knife would shave him.

Q. You don't know whether he did or not?

A. I don't know whether he did or not.

372 Q. Now, this, I understand occurred on the 26th of March?

A. Yes sir.

Q. 1916?

A. Yes sir.

Q. That was during the month that he continuously wore that coat, was it not, and had a right to?

A. After the coat was issued to him—I don't know the date—but at all meals he was supposed to wear that coat or he would not be permitted in the dining room.

Q. So that there was nothing irregular for him to wear this coat on this particular day?

A. No nothing irregular—but he could not have any pocket arranged on the front of it to carry anything in.

Q. How many months that knife had been in this coat, you don't know?

A. No sir, I don't know; I never saw the coat.

Q. What sort of a man was Turner, physically?

A. A man that weighed one hundred and sixty-five or seventy pounds or probably a little more—he was not a healthy man.

Q. He was a strong man?

A. Well, he was apparently strong.

Q. He was an able bodied man, was he not?

A. As far as I know.

Q. He possessed the full use of all his faculties, so far as you know?

A. So far as I know; I never had any conversation with Mr. Turner.

Q. Now, you have known the defendant——

A. Sir?

Q. You knew the defendant a great many years, did you not?

A. Ever since his arrival at the prison—yes sir.

Q. He had been in the hospital a great deal?

A. He made regular trips over to the hospital every day for probably a year or more—I don't know how long.

Q. He was at the very time of this occurrence, he was suffering from Bright's disease, was he not?

373 A. I don't know.

Q. At the very time of this occurrence he was going backward and forward to the hospital?

A. He would go over to get marked "quarters" and lay around,—not do any work.

Q. No matter what reason there might be for it—he was being treated at the time by the doctor, was he not?

A. I don't know, he would go over and go on the sick call and the doctor would talk to him, and he would go outside, and get marked "quarters."

Q. The doctor was the man who marked him "quarters" after examining him?

A. Whether there was any examination, I don't know—the doctor was the man who marked him "quarters."

Q. You were not present at the time that the doctor made up his mind what to do with the prisoner?

A. Not at the time he physically examined him.

Q. What the doctor found was the matter with him, you don't know?

A. He would go on sick call.

Q. He would not go on sick call unless he was under the doctor's care—sick?

A. He would go from one end of the year to the other, if he was let. He went for a year—he would be marked "quarters" every morning.

Q. They would not mark him quarters unless he was sick?

A. He would give him the mark, "quarters" just to see what he was doing.

Q. Who was the doctor at the prison at that time?

A. Dr. Yohe.

Q. He performed his duties?

A. I suppose so.

Q. If the doctor marked him for the hospital, what would be the reason for it?

A. There is various reasons for marking "quarters."

Q. What did you think was the reason?

A. The doctor would mark him "quarters" if he was not feeling well, or claimed that he was not feeling well.

Q. The doctor would mark him quarters if he claimed he

374 *he* was not feeling well?

A. Yes sir.

Q. What makes you think that he must have been feigning there or what makes you think so?

A. Judging from the way that he was acting when he was out of the ward, I judge he was *fiegning* sickness all along.

Q. Did you report that to the doctor?

A. The doctor could see for himself.

Q. You were an officer of the prison, and it was your duty to see that the rules were properly enforced?

A. It was my duty to see that the report—when the doctor marked him "quarters" that he had no work to perform, and to put him over in the proper portion of the prison.

Q. And the doctor would mark him "quarters"?

A. Yes sir.

Q. And you obeyed the doctor's order?

A. The man that was put over the guards, the orderly, took him over and put him in quarters.

Q. You have no reason to doubt the doctor's accurateness or correctness?

A. No sir, no.

Q. How long had Mr. Turner, the guard, been there from Atlanta?

A. I could not say now—probably five or six months—probably along there.

Q. Turner was a guard at the Atlanta military prison or Federal prison?

A. I believe so.

Q. You so understood, did you not?

A. I so understand, yes sir.

Q. Do you know what reason there was or what trouble occurred down there at Atlanta on Turner's part, that caused him to be moved up to Leavenworth, from Atlanta?

A. I don't know anything about that.

Q. What did you understand was the trouble there?

A. Nothing, only as you just tell me now.

Q. I have not told you that there was trouble there—you have inferred that, just as you inferred that Stroud was not sick—you did know that he was transferred?

A. I know I heard he was transferred from Atlanta.

Q. How long was he there?

A. I don't know—probably six months—probably longer.

Q. What aged man was Turner?

A. How old?

Q. Yes?

A. I should judge about in the neighborhood of twenty-five or twenty-eight years of age—probably more.

Q. Do you know a prisoner of the name of Smith, who is now in Joliet?

A. No, I don't know who he is—what was his number—do you knew his number? I don't know.

Q. Do you know of any trouble occurring in this dining room between this same guard and this man Smith of Joliet, about a month, sometime, before this occurred?

A. No sir.

Q. You don't remember that?

A. No sir, not with a man named Smith.

Q. Do you know of this same guard having trouble with another man in that dining room?

A. Mr. Turner aided in taking a man out of the dining room there one evening, because the fellow got, became disobedient there—it was on the first section.

Q. That would be this section?

A. Yes, there were some of the guards there; it was just about the time that they were marching out. The guards gathered around the man there and they carried him out.

Q. Who was it knocked him out that night?

A. He was not knocked out.

Q. What caused him to be carried out?

A. He refused to go—it was something in relation to his food, I believe, and the guard tried to get him to come along, and he grabbed hold of the guard, and two or three of them got around
376 him and Mr. Turner got his arms around him and took him out in the aisle, and they took him over to the isolation.

Q. How long did that occur before this killing occurred?

A. Oh, this was quite a while before that.

Q. And what do you mean by "quite a while"?

A. Say two months.

Q. Two months?

A. Yes sir.

Q. Did these men occupy those same seats at different meals?

A. There was some of them marching out at that time.

Q. What I want to know, was this the seat usually occupied by Stroud?

A. Did they occupy their seats?

Q. Yes—the same seats?

A. I don't understand what you mean.

Q. As I understand you, on the night of this occurrence, or day of this occurrence, Stroud had this third seat on this row?

A. Yes.

Q. Do they usually occupy the same seat?

A. No—in that case there, probably on the Saturday evening, Stroud would be over on the first section. As I explained that at first, they change sections according to the number of men that come in and out of the dining room at that time.

Q. Do you know how close this man Stroud was to this man Turner the night of this trouble with the other man?

A. Turner was in the other aisle on the other side,—I don't know how close to him.

Q. Did he see that man struck on that night?

A. No, I never saw any man struck in that dining room till then, within three years, to go back that far.

Q. Do you know what knocked out that man on that night?

The Court: He has answered that, Mr. O'Keefe; it does not help it a bit to repeat anything—it just takes time, that is all.

Q. You saw this man that they carried out?

A. Yes sir.

Q. How big a man was he?

A. Oh, he was a man about five feet three or four—stock, heavy built fellow. They carried him from the end of the section there.

377 Q. The front end or the back end?

A. Over here on the front end of the section—took hold of him and carried him out; there was nobody knocked out, nor stretching him out, or anything at all that evening.

Q. Who was the guard that first got in trouble with this man that you have mentioned here?

A. I don't know; they were marching out—the first I seen him, they were marching out, and Turner took hold of him and carried him.

Q. Did he carry his whole weight?

A. Yes sir.

Q. Because he was unconscious?

A. He was not knocked out—he was not unconscious.

Q. What was he being carried out for?

A. I presume to keep him out of getting into trouble—he was fussing with the other guards. He was not knocked out or struck with a club.

Q. Did Turner put his arms around him from the back?

A. He put his arms around him from the back.

Q. When Turner had his arms around him that way, where were the other guards?

A. They let go of him.

Q. That was in plain view of the other prisoners there?

A. All the rest of them there had gone out that were in. At that time most of them had gone out before. I don't think Turner was engaged in that occurrence. One or two of those other guards took this fellow out. There was no blow and no man struck in that dining room at all.

Q. Was there an occurrence at all like that involving him, in which a man was knocked down in the dining room?

A. If he had struck a blow in there there would be—the sound would be all over the dining room—everybody would know it.

Q. You could hear it with a thousand men in there, could you?

A. Yes sir.

(Witness Excused.)

378 A. H. BOYER, called as a witness on the part of the government, being duly sworn testified as follows:

Direct examination.

By Mr. Robertson:

Q. What is your name?

A. A. H. Boyer.

Q. Where do you live, Mr. Boyer?

A. Webb City, Missouri.
Q. What business are you in now?
A. Book keeper with the Surface Belt Company.
Q. At Webb City, Missouri?
A. Yes sir.
Q. Were you at one time an officer of the government at the United States penitentiary near Leavenworth?
A. I was.
Q. What was your official title?
A. I was a guard.
Q. Do you remember the occasion of guard Turner being killed in the prison, about the 26th of March, 1916?
A. I do.
Q. Were you there in the prison at that time?
A. Yes sir.
Q. And did you see it happen?
A. Yes sir.
Q. Did you know at that time who the defendant Stroud was?
A. No sir.
Q. You didn't know him—did you know Mr. Turner?
A. As a guard, only.
Q. You knew him as a guard, an officer in the prison?
A. Yes sir.
Q. When did you leave the prison—how long ago?
A. Last July—last year.
Q. Last year?
A. Yes sir.
Q. Where were you at the time of this occurrence, where were you situated in the dining room?
A. In the back end of the fourth aisle from the south.
Q. Does that mean the aisle that my pencil is now indicating?
A. Yes sir.
—. Just tell the jury now in your own way what you saw and heard —if anything?

379 A. I just—we keep patroling the aisles—the guards do, in the dining room. I just reached the back end and turned toward the front when I noticed Stroud and Turner standing talking to each other in the aisle. About that time—I thought it was a little unusual that they should be standing there talking; that is an unusual occurrence—I saw Stroud strike Turner, and I just walked on down the aisle just the same as nothing had happened, and about that time I saw Turner raise up his hand and motion to the Captain, and everybody raised up in the dining room and I turned around and began seating the men down, and telling them to sit down, and after I got them sat down they had then carried guard Turner out of the dining room. That is about all I saw.

Q. Did you see the knife that Stroud had?
A. Yes; when I got down opposite Turner, across from the aisle from him, I saw Stroud standing there with the knife in his left hand, and blood dripping off the end of it.
Q. Who, if anyone, was near him at that time, do you remember?

A. Well, guard Smith had got across there about that time—no he hadn't—he hadn't gone across yet—I was his partner there.
Q. This all happened in a very short space of time?
A. Yes sir—just a few seconds.
Q. A few seconds is your judgment of it?
A. Yes sir.
Q. Now, did you hear anything that was said between Stroud and Mr. Turner?
A. No sir, I could not.
Q. You have learned since it was Stroud that had the knife?
A. Yes sir.
Q. What, if anything, did you notice about Mr. Turner's club?
A. Mr. Turner's club was held under his left arm.
Q. Well, did you see it leave the left arm?
A. No sir, I didn't.
Q. You don't know about that?
A. No, I don't know about that.
380 Q. Did you see the club afterwards?
A. No sir.
Q. Did you have anything to do with taking Turner out of the room?
A. No sir; I presumably had my hands full keeping order.
Q. That was at the Sunday noon meal?
A. Yes sir.

Cross examination.

By Mr. Kimbrell:

Q. Mr. Boyer, you say you are located at Webb City, now?
A. Yes sir.
Q. How long have you been there?
A. Since August last.
Q. What are you doing there?
A. I am book keeper with the Surface Belt Company.
Q. Did you live there befo*er* you were a guard out here at the penitentiary?
A. No sir.
Q. Were you in the same aisle with Turner the night Turner was killed?
A. No sir.
Q. Who was serving at the other end of his aisle, what guard?
A. Guard Whitlatch, I believe.
Q. Did you hear Mr. Whitlatch's testimony at the first trial of this case?
A. No, I don't believe I did.
Q. Did you on the second?
A. On the second—yes sir.
Q. Yes sir—Did you hear him state something about seeing Stroud having both hands hold of Turner's club—do you remember that?
A. I don't remember that.

Q. Did you see anything of that kind?
A. No sir.
Q. You never saw Stroud holding Turner's club at all?
A. No sir.
Q. Never say his hand on it, did you?
A. No sir.
Q. But you did see Stroud strike the blow in Turner's breast?
A. Yes sir.
Q. And you are sure that after that Stroud never had has hands on Turner's club?
A. I say I didn't see it.
Q. You were where you could see it?

381 The Court: I understood the witness to say he was in the other aisle and the men all stood up.

Q. Was it because the men all stood up between you and the occurrence?
A. I turned around and commenced seating the men down, and I was with my back to the occurrence, and didn't see after that.
Q. How long did you see Turner and Stroud talking altogether?
A. Well, just a matter of a few seconds, I judge.
Q. I will ask you if in the second trial of this case you gave this description of it, stated this in regard to the length of time: "But you did see the men standing there talking? Answer: Yes sir. Question: How long did you observe them there in conversation? Answer: Well it would be less than a minute, I suppose? Question: But probably about 60 seconds? Answer: About that length of time—I could not say that because I didn't pay much attention to it. Question: But that is your best judgment, best measure you can make of it? Answer: Yes sir. Question: Now, as they stood there that minute, or sixty seconds, talking, did you see Mr. Turner make any demonstration that is as if—he wanted Stroud to get asay from him? Answer: No sir." —did you make those answers to those questions at the second trial of the case, as you now remember it?
A. It may be along that line, I don't remember just the words I used.
Q. Did you say about a minute, they talked?
A. I don't remember how long they talked there, but a very few seconds, though.
Q. How close were they standing there together *together*, as they stood there talking that minute?
A. Well, about two or three feet apart, I guess.
Q. Would you stand up there and illustrate about how close?
A. About that close.
Q. Was Stroud's hands down at his side?
A. I didn't notice them.

382 Q. You didn't notice how he was holding his hands?
A. No sir.

Q. Do you know how Turner was holding his hands?
A. I didn't notice that.

Q. About how far away from the two men were you as they stood there talking?

A. Well, I was about a third down from the back, I guess.

Q. About how many feet—if you have some measure here—about the length of the jury box or some way of illustrating?

A. About thirty or forty feet, I guess.

Q. Could you hear their voices over where you were?

A. No sir.

Q. They were ap-arantly talking, as far as you saw, in a friendly way?

A. Well, I don't know; I didn't notice how they were talking. I just saw them standing there.

Q. Did you hear Stroud say anything about being or not wanting to be reported, because his brother was here and he wanted to see him Monday?

A. No sir.

Q. Did you hear Turner say anything about going on, or anything of that kind?

A. No sir.

Q. Now, at the first trial of this case—did you see the men when they approached each other?

A. No sir.

Q. The first you saw of them they were standing talking to each *to*her?

A. Yes sir.

Q. And how long they had been talking to each other before you looked over and observed them, you don't know, do you?

A. No sir.

Q. You say you saw Mr. Turner fall, didn't you?

A. No, I believe, if I remember right, I saw him start to fall.

Q. You saw him when he first started to stagger, didn't you?

A. Yes sir.

Q. And you had been looking at him just before he started to stagger?

383 A. I imagine I had—yes sir.

Q. And was he in your view from the time he started to stagger until he fell?

A. No sir. When he started to stagger I turned to the seating of the men.

Q. How was it that the men didn't shut off your view when you saw him start to stagger?

A. Right then the men were shutting off the view.

Q. The men were shutting off your view—however, these men didn't cut off your view of Stroud and Turner until after he started to stagger and fall?

A. Well, I don't think they cut off my view at all, because I think I turned around and turned my back to them.

Q. Now, I want to get back to this question, if you ever after Stroud struck Turner in the breast—you saw that, didn't you?

A. Yes sir.

Q. You saw that thrust—if ever after that time you saw Stroud holding to Turner's club?
A. I did not.

Re-direct examination.

By Mr. Robertson:

Q. If I understand you correctly, at the movement between Stroud and Turner, the men raised up around there?
A. Shortly after that movement—yes sir.
Q. I believe you made the remark that it was a very unusual thing for a prisoner to stop and speak to a guard—state whether or not there was a well recognized rule and regulation there which prohibited a prisoner from approaching the guard and speaking——

Mr. O'Donnell: We object as to what the rule was—the question is what happened at this time.
The Court: I think you brought that out on cross examination of Mr. Purcell. It seems to be uncontradicted; I think it would be unnecessary——

Mr. Robertson: Accepting that as settled, I will abandon
384 the question. That is all.

Mr. Kimbrell: That is all.

(Witness excused.)

KYLE F. SMITH, called as a witness on the part of the government, being duly sworn, testified as follows:

Direct examination.

By Mr. Robertson:

Q. What is your name?
A. Kyle F. Smith.
Q. Where do you live Mr. Smith?
A. 612 Kickapoo street.
Q. Leavenworth, Kansas?
A. Yes sir.
Q. Are you a government officer at the Federal prison at Leavenworth?
A. Yes sir.
Q. What officer are you?
A. Guard at the United States penitentiary.
Q. Were you occupying that position on the 26th of March, 1916?
A. Yes sir.
Q. At the time of the occurrence that this case is about?
A. Yes sir.
Q. I wish you would just step over here for a moment, and bring the stick there that is behind you, the pointer? At the happening of this occurrence, where were you—indicate on this Exhibit one, about where?

A. Occupying this aisle, here.

Q. Can you state what aisle that might be known as by number?

A. That is—one, two—three aisle.

Q. I think that is all; you can sit down—now, just go on and tell the jury in your own way, what you saw and heard there between Stroud and guard Turner?

A. It was my duty to pass up and down from the center of that aisle to the front. As I — coming up toward the front, I noticed Captain Purcell rise up out of his seat, and he nodded to me like that, looking in that direction. I turned and looked in that direction; I saw Mr. Turner *Turner* but could not see Stroud at
385 that moment until Turner stepped; then I could see Stroud.

Q. Why could you not see Stroud?

A. Because Turner was between us. He obstructed my view until that moment. When Turner stepped I could see Stroud; as Mr. Turner stepped he took about two steps, staggered and fell. I walked down the aisle to go between the seats—the seats in that section was not occupied. I went back down and crossed through the seats that were not occupied—I didn't have to make anybody get up, and when I got through, Mr. Turner was lying right against the seat so that I could not pass beyond the seats because he was lying there. I reached down and picked him up, and as I did, I noticed the knife in Stroud's hand, and blood dripping off it. Captain Purcell was passing down—he was standing right beside me, and I said, "Look out for the knife." Three prisoners helped carry him out to the end of the section, then I let go and I walked back to my own portion of the dining room, where I belonged.

Q. Did you hear Stroud say anything to Captain Purcell there?

A. I did hear them saying something, but I could not distinguish what the conversation was. He was standing some distance, you see—he was still standing inside of the section—he had not passed out of the section.

Q. When your attention was first called to this matter, did you see Mr. Turner's club?

A. I didn't notice at that time, no sir, but his hands were by his side.

Q. Did you see it at all?

A. His hands were by his side—no sir.

Q. His hands being by his side, state if you know, where a guard would be carrying his club?

A. It would naturally be by his side, in his hand by his side; the only time I think I remember seeing the club, it was lying on the floor by the side of Mr. Turner.

386 Q. Is the club sometimes carried under the left arm?

A. We often do—yes sir.

Q. But you didn't see it at all?

A. No sir.

Cross-examination.

By Mr. Andres:

Q. Mr. Smith, how long have you been a guard at the Federal penitentiary?

A. Sixteen years.

Q. Do you know what day of the month this killing occurred on?

A. On the 26th of March, 1916.

Q. About what time of the day was it?

A. About 12:20.

Q. You were in the aisle next north of the one where the trouble occurred—were you not?

A. Yes sir.

Q. What is the custom up there in regard to giving a prisoner permission to go out?

A. If a prisoner wishes to leave the dining room, he raises his hand.

Q. Does he step out in the aisle and raise his hand, or does he stay in his seat and raise his hand?

A. Well, I have seen them, in case of emergency, start to raise up. If you happen to be close they would not wait until you got to them, but if they are some distance they wait until you nod.

Q. Do they remain seated or do they rise where they are?

A. It is customary to get permission before you rise.

Q. And permission is never given, of course, until he is observed by the guard in the immediate attendance?

A. It is supposed to be given.

Q. In other words, you being in charge of this aisle here and this—I mean this row of seats and this one, you would not give a prisoner over in this row of seats permission to go out, would you?

A. Well, it is possible.

Q. Would you do that?

A. It is possible—for instance, the guard here, for instance there was only one guard in that section, and he has passed to the back of the dining room, and I was in this section and that man
387 happened to attract my attention, I would give him the permission—that is permissible.

Q. How far did you say it is from the bench that Captain Purcell occupies during meal hours, to the first seat in the center aisle?

A. Well, about the distance across this room.

Q. How far would that be?

A. Forty feet, I should judge.

Q. How far did you say Captain Purcell was from Turner when Captain Purcell made the motion of his head, thus?

A. Well, it was probably 34 to 40 feet—I am just estimating that distance.

Q. Your best judgment, is all?

A. From the first seat in that section to where Turner was standing, I should judge it was about 34 or '5 feet to the front of the section.

Q. Captain Purcell didn't point like I am pointing now, to the southwest, but he merely made a nod or motion of the head to the south?

A. Yes, that is all.

Q. And did you have to turn around to see what you saw, Mr. Smith?

A. Certainly, I was facing him, when he done that way.

Q. Where was Mr. Turner with reference to the back end of the row 2?

A. I don't understand you.

Q. Where was Mr. Turner in this aisle that would be aisle three, wouldn't it, or two?

A. Well, about where the illustration shows there is about where he was standing there—he was facing that direction.

Q. How near was he—which row was he in—how many rows of seats are there in this dining room?

A. I don't know—I think about ninety, I am not sure.

Q. How many?

A. Let's see; I forget how many there are in a row. I am just trying to recall how many rows there are.

Q. How many seats to one of those benches?

A. Six.

388 Q. Now, how many seats in a row—your best judgment—didn't you ever count them?

A. I have counted them many times, but I don't remember.

Q. Just your best judgment?

A. I would say there is fifty.

Q. Well, would you say there were forty-two?

A. Yes, forty-five or fifty.

Q. Forty-five or fifty?

A. Yes.

Q. Now at that time there were two guards in an aisle?

A. Yes sir.

Q. Are you sure about that?

A. Yes sir.

Q. And the guard in the rear of this aisle has charge of the last half and the guard in the front has charge of the front half?

A. Yes sir, that is the custom.

Q. That is the custom—now, then, with reference to the middle of this row of seats here, where was guard Turner when you turned around and saw him stagger?

A. Well, he was past the middle towards the front—anyway in front of the middle of the section.

Q. Yes—in other words, guard Turner, when you turned around and observed him, was probably five feet—I mean five seats from the front of that row of seats there, was he not?

A. Oh, ten or fifteen.

Q. Ten or fifteen—was he nearer ten than fifteen?

A. Yes sir, nearer ten or twelve.

Q. It was between ten and twelve rows?

A. About between ten and twelve.

Q. It was almost up in front here, wasn't it?

A. Well, those seats are from fifteen to twenty-four inches apart.

Q. Well, let us get at it in this way, Mr. Smith: just assuming that there are forty-two of those bench seats in a row, that would mean that the guard in the front end, who would have in charge the front half, would have twenty-one of those seats to look after?

389 A. Yes, sir.

Q. Then, if he was up ten or twelve rows from the rear—from the middle, we will put it, he would be in the center of the first half, wouldn't he?

A. That is about right, yes sir.

Q. And that would be quite close to the front?

A. It would be nearer the front than the center of the dining room—nearer the front.

Q. Now, then, when Captain Purcell nodded his head to you, you didn't think anything was wrong, did you?

A. Nothing whatever.

Q. You just looked?

A. I just looked.

Q. Did Captain Purcell seem at that time anxious or confused about anything; in other words, did he have, Mr. Smith, on his face the expression of a man that saw a terrible catastrophe—distracted?

A. No.

Q. He remained in his seat, didn't he?

A. No, he was rising.

Q. He was rising out of his seat?

A. Yes sir.

Q. And you had time to go through the seats and get to Turner before ever Mr. Purcell got down there?

A. Yes sir, I was there a little before he was.

Q. And, of course, while you were going to Turner, you kept your eyes on him, didn't you?

A. Not after he fell—I couldn't see him.

Q. Well, I understand, but before he fell?

A. I would not see him all the time there—you see there is men passing in that aisle, passing food and coffee, and the aisle is congested more or less, and I would have to pass among them.

Q. There is a great deal of movement in those aisles?

A. I could not possible keep my eyes on him all the time—I was passing through this aisle and through those seats.

Q. Did you see at the time you were going over there,

390 that Mr. Turner had been dealt a fatal blow at that time?

A. No sir.

Q. Where was Stroud?

A. He was standing in the aisle.

Q. And where was Turner?

A. He was taking a couple of steps; he was starting to fall—then before I got there, before I touched my hand to him, he fell, then at that time.

Q. Now, Mr. Smith, to refresh your recollection, when you went over there and Purcell came down, didn't you hear Purcell say, as he naturally would, "What is the trouble, boys"? or words to that effect?

A. There was some conversation between him and Stroud.

Q. Was the band playing then?

A. I think so.

Q. The band had not stopped playing when he got over where Stroud was?

A. I don't think so. I don't remember whether he had stopped the band or not.

Q. The band was playing at the time?

A. I don't know. The band had been playing, but whether he stopped it when he went down there, I don't remember.

Q. Don't you remember, Mr. Smith, that Purcell said there, "What is the trouble?" Don't you remember that—try and think now?

A. I don't remember that, judge; there was some conversation between them, but I don't remember.

Q. Of course you didn't see Stroud strike Turner, did you?

A. No sir, I didn't.

Q. And you don't know he hit him of your own personal knowledge?

A. What I observed as I passed into the aisle was, there was a man standing with his knife in his hand, and blood running off of it on to the floor, and the guard lying there and blood running out from under the guard, as I stepped into the aisle—that is what I observed.

Q. You made no inquiry there?

391 A. I picked the guard up and asked him if he was hurt.

Q. Did you see his club there?

A. The club was on the floor beside him there—yes.

Q. In your judgment how far was this club from Mr. Turner's body when you observed it?

A. Well, I could not say nor specify the distance. I just remember that the club was lying on the floor, because I remember I picked it up. His cap and club were lying on the floor.

Q. You were on duty, working for the government, for the month or six weeks preceding this killing, were you not?

A. Oh, yes sir.

Q. And guard Turner was also working for the government and on duty before that time, during this six weeks or month?

A. Yes.

Q. Do you recall some trouble between guard Turner and a convict named Smith, along about a month before the killing of Turner?

A. No sir, I don't.

Q. Were you one of the guards, Mr. Smith, that assisted in taking a prisoner out of the dining room there because he complained of the food?

A. I have no recollection of taking anybody out, no sir.

Q. Did you see anybody taken out by other guards, Turner one of them, from this dining room, within sixty days prior to the time of the killing of Turner?

A. No sir.

Q. You don't remember it?

A. I have no recollection of it, no sir.

Q. It didn't occur, as far as you know?
A. If it occurred, I don't know.
Q. Did you hear of it?
A. No sir, never heard anything of it—no sir.
Q. You knew a convict by the name of Smith, a little red-headed kind of man that was pretty well built, and who is now in Joliet penitentiary?
392 A. I can't recall him—give me something more definite and perhaps I can.
Q. How long had guard Turner been a guard at the United States penitentiary before his death?
A. I don't recall, but I should say a couple of years.
Q. Are you sure he was there a couple years?
A. It might have been eighteen months.
Q. Wasn't it about five months, Mr. Smith?
A. There is a big question in that—I don't know; he worked nights and I worked days—I don't remember that.
Q. He was working days when this killing occurred?
A. Yes.
Q. You think that you knew him about two years, anyway?
A. Something like that—it may not have been that long.
Q. Was there much commotion in the dining room when you went over to where Turner was ?
A. Yes sir.
Q. Did the men rise and attempt to assault anybody there?
A. No.
Q. Mr. Smith, I want to ask you this question; a guard—a convict is permitted to talk to a guard and make his wants known, is not that the rule?
A. Oh, yes.
Q. What is the idea of a guard carrying a club up there, why do they carry it?
A. Well, they carry it for their own protection—that is what I carry mine for.
Q. In other words, you never attempt assaulting a man until you feel that your own life is in danger or unless you are being attacked, is that right?
A. That is the rule—yes sir.
Q. Now, when a guard goes up—when a prisoner—assuming now that I were a prisoner up there and in your charge, and I would walk up to you at that time and I would say something like
393 this, "I didn't like that meal today"—would that be sufficient justification for you to strike me with your club?
A. No.
Q. You would not strike a man with a club for that?
A. No, sir.
Q. If a man would come at you and kind of cuss you a little bit and not offer to strike you, would that be sufficient justification for you to strike him?
A. Not by any means—no sir.

Q. If you misunderstood a man, and if you observed that he was angry, and you misunderstood what he said, would that, under the rule, be sufficient justification for you or any other guard to strike him?

A. No, he would not be struck except in self-protection.

Q. Captain Purcell says that the reason that a convict is not permitted to talk to a guard—and you say that he is, is that *is that* he might misunderstand him and punish him with his club—do you know any such rule?

A. Is that a rule?

Q. Yes, or a custom?

A. No, I could not say that I do.

Q. You never did hear of it?

A. No.

Q. And you never saw any other guard hit a man because he misunderstood him?

A. No—strike a man for what?

Q. Because he misunderstood him?

A. No sir, never—I don't understand the question.

Q. Now, suppose that those two rows of chairs—seats—represented benches or seats, and I am sitting back where that gentleman is, in the third seat, and I wanted to go out, and you were the guard in the aisle here, and I would raise my hand and you nodded, which means to go, if I would step out there into the aisle, which direction am I supposed to go?

A. The aisle would go this way, judge, not where we are, but this way. If that third man would raise his hand to me as I would pass him, I would lean over and see what he wanted. It does not signify because they raise their hand to a guard that he wants to leave
394 the dining room. If the third man would raise his hand to me, I would lean over to him to see what was wanted.

Q. Then it does not always apply—you do not always know what a man wants when he raises his hand?

A. No.

Q. Suppose that you are along in here and a man on that side raises his hand, and you *not* to him, and he steps out and he walks to where you are and you ask him what he wants, is that a violation of the rules up there, or is it permissible?

A. It is a violation of the rules, but it is sometimes done, up there.

Q. You don't report prisoners for that, do you—you would not do that?

A. It would depend upon the attitude of the man.

Q. If he said, "Don't report me until tomorrow, I want to see my brother—I understand he will be here to see me—" if he would come up and say that?

A. If he would come up there in a respectful way——

The Court: Don't both talk at the same time—the stenographer cannot take two conversations at the same time.

Mr. Antdres: I will try not to be guilty again, your Honor.

Q. If you are fifteen or twenty feet away from a convict, and he raises his hand to you, and you nod, "yes," and give your permission, now at that moment, you would not know what that man wanted, would you?

A. Not unless you went to him and found out what he wanted.

Q. I suppose you generally go over there, if you want that man's motive, don't you?

A. If he wants to go out he will probably go out.

Q. I don't think, Mr. Smith, you understand it.

The Court: I think he did; he said if the man wanted to go
395 out he would probably go out, but may be he didn't wish to go out; therefore, when the guard nodded, he would not go out; if he didn't wish to go out it might become necessary for the guard to walk over and ask him what he wanted.—Why debate a question like that, Mr. Andres?

Q. Now, then, take your aisle, for instance, your aisle runs east and west, don't it?

A. Yes sir.

Q. Or, probably to be more accurate, southwest and northeast?

A. Directly east and west.

Q. Directly east and west, so that, when a man goes out of one of those seats here, he would be walking north, wouldn't he?

A. In stepping out—yes sir.

Q. Now, when you get a signal from one of the men under your charge, and you are fifteen or twenty feet away, from him—I am assuming it is you—and you nodded to him, "All right," and he goes out in the aisle, that means that he wants to go out, don't it?

A. Something like that—yes.

Q. And would he go?

A. Yes.

Q. Now, in what direction, under the rules, is he supposed to walk after he gets out into the aisle?

A. If he is leaving the dining room, he would naturally go towards the door.

Q. That would be east?

A. Yes—east.

Q. If he wants to go in the rear, he would go west, wouldn't he?

A. Yes.

Q. Is either of those courses that he takes against the rules or in accordance with the rules and permission?

A. I don't know that there is any rule against a man going toward the back of the dining room. Of course if you were standing back to him and he cannot speak to you, he would go back, but if he wanted to leave the dining room he would go to the east.

Q. But suppose he did want to talk to you and you are com-
396 ing from the office and he turned to the left and walked west?

A. He has no business, judge, walking that way.

Q. That would be in the rear, wouldn't it?

A. It would.

Q. And you just said that you didn't know of any—that that would be any infraction of the rule that restrains them?

A. I don't know that that is the specific rule against it—it would not be proper at all.

Q. There was no rule against it that you know of—how long have you been there?

A. Sixteen years the second day of May.

Q. Mr. Smith, you were pretty well acquainted with Turner, were you not?

A. No sir, not very.

Q. You saw him a great deal?

A. He had not worked with me.

Q. Will you describe him to this jury, giving his age, his height, and general build?

A. I am not very good on that. He was a man as big as I am—probably not as slender as I am, more full in the face—more full in the face. I don't think he was quite as tall as I am—possibly he was as tall as I am.

Q. How heavy was he?

A. About as heavy as I am—possibly *n*eavier.

Q. You weigh 175?

A. 165—and I should judge he was a little heavier than I am, about 175 and possibly an inch shorter.

Q. How tall are you?

A. Five feet ten and a half.

Q. What was Stroud's physical condition as you observed it, at that time?

A. I guess as good as it had ever been.

Q. Do you know that he was undergoing treatment for Bright's disease by Dr. Yohe at that time?

A. Not at that time, I think he was working every day.

Q. That is your judgment? You know that Robert has been sickly ever since he has been there?

A. I learned since this occurrence he had, but before that, I don't know.

397 Q. You learned after the killing that Stroud had been in poor health prior to that time?

A. I knew he was in the hospital undergoing treatment before that, but he was in his cell and working at the time this happened.

Q. Now, you testified on the second trial, didn't you?

A. Yes sir.

Q. I am going to read you several questions and answers and ask you if you gave the answers in response to the questions: "You testified in this case before? Answer, Yes sir. Have you read over your testimony? Answer. I just wanted to see what the cross-examination was. Question: Did you read the direct examination also? Answer: I think so, yes sir. Question: You say you saw Turner take a step forward, did you not? Answer: Yes sir Question: And you saw Stroud step back, did you not? Answer: Yes sir. Question: That is, as Turner took a step forward toward

Stroud, Stroud stepped back, didn't he? Answer: I could not say which stepped first, it was practically at the same time. But the act of Turner stepping forward uncovered Stroud so that I could see him."—did you give those answers in response to questions that were asked you on the former trial of this case?

A. Yes sir.

Q. I will read you some more questions and answers, Mr. Smith, and ask you if you gave these answers in response to questions: "Question: Did you see this defendant, Robert Stroud, take hold of the club with one or both hands and try to bear it down? Answer: I didn't see the club at all until it was lying on the floor. Question: ——"

The Court: That is what he testified here.

Mr. Andres: These questions are introductory, and they are preceding some others.

Q. "Question: If Turner had this club and took it out from under his arm and Stroud caught hold of it, it was before you looked up, as far as you are able to judge? Answer: I could not tell you
398 whether that occurred at all or not; I did not see it occur, no sir." Now, Mr. Smith, Mr. Turner was not what you would call an even tempered man, was he?

A. I didn't come in contact with Mr. Turner—I am not well acquainted with him at all. He worked different shifts. I didn't come in contact with him at all.

Q. His disposition was spoken of occasionally in conversations among the prisoners as well as among the guards, that, they would say that "Turner will lose his head?"

A. Not to my knowledge.

Q. He was not a cool and phlegmatic guard, such as you appear on the witness stand?

A. He was as far as I know.

Q. Did you notice his face on that occasion after Captain Purcell nodded to you?

A. I seen his face—I could see the side of his face.

Q. It was not read?

A. You see he was in the act of falling—falling on the floor, and as far as the expression on Turner's face, I could not say.

Q. You know Howard Beck, Mr. Smith?

A. Yes sir.

Q. And he was a guard up there at that time?

A. I am not sure—I think he was.

Q. Do you know where he is now?

A. You mean at the present time?

Q. Yes?

A. I saw him out there in the hall way a few moments ago.

Q. He is here, is he?

A. Yes sir.

Mr. Andres: That is all.

The Court: Is that all?
Mr. Robertson: That is all.

(Witness excused.)

E. E. WHITLATCH, called as a witness on the part of the government, being duly sworn, testified as follows:

399 Direct examination.

By Mr. Robertson:

Q. If you can remove from your mouth whatever is in it—are you chewing gum?
A. Yes sir.
Q. Just remove it from your mouth, please?
The Court: Talk out loud, so that everybody over in that part of the room can hear you.
Q. Your name is E. E. Whitlatch?
A. Yes sir.
Q. Mr. Whitlatch, where do you live?
A. I live at Sand Springs, Oklahoma.
Q. What is your business?
A. Working for the Railway Company.
Q. Mr. Page's railway down there?
A. Yes sir.
Q. Were you at one time an officer of the United States in the prison out here?
A. I was.
Q. And were you such officer on the 26th of March, 1916?
A. I was.
Q. And at the time when this occurrence that this case is about took place?
A. Yes sir.
Q. And did you before that know the deceased, Mr. Turner?
The Court: What is the deceased's first name?
Q. Andrew F.—that is correct, is it?
A. Yes sir.
Q. Did you know that the defendant Robert F. Stroud was in the institution out there?
A. No, not personally.
Q. You saw this occurrence between the deceased and defendant Stroud?
A. A part of it.
Q. Just tell the jury in your own way what you saw there, what you heard between the two men?
A. On March 26, 1916, I was detailed as a guard in the dining rook during the noon hour for the purpose of patrolling up and down the aisle, to keep order and attending to the rules of the prison.
Q. Were you in the same aisle with Guard Turner?
A. The same aisle, in the back half.

400 Q. I beg pardon—you had the back half indicated here, and guard Turner had the front half?

A. Yes sir.

Q. Go ahead and tell what occured there?

A. In patrolling up and down the aisle, when I got in the back part of the aisle I faced about, coming this way. I noticed guard Turner and a prisoner standing in the aisle talking. When I was moving this way, I noticed this prisoner, Stroud, lunge or strike towards Turner, and I started to move on this way, and Captain Purcell, J. M. Purcell, got up and started down. The waiters began to crowd around where I saw the two men, and the men began to raise up out of their seats, and I got down very near to them—I don't remember—I suppose eight or ten feet, and noticed the knife, being in this prisoner's hand, drawn back in this position here, his left hand. I started then—what attracted my attention then was the men raising up out of their seats to see what the disturbance was.

Q. Did this all happen in a very short space of time?

A. Well, it was not over twenty seconds or twenty-five.

Q. That is your idea about it?

A. Yes sir.

Q. Just a few seconds?

A. Yes.

Q. Did you see Mr. Turner's club?

A. I didn't see his club at all. I could not see very much of him after this lunge was made.

Q. Do you remember of noticing Shroud ahold of the club with either of his hands?

A. No sir, I don't.

Q. Did you hear anything that was said?

A. Not a word, sir.

Q. I want to call your attention to a record here or memorandum and ask you to look at it and see if it will refresh your recollection on it——

Mr. O'Donnell: If your honor please, I don't think this
401 witness needs his recollection refreshed.

The Court: I don't think so. Call his attention to what you want, possibly.

Q. I hold in my hand the transcript of the testimony that the witness gave on the first trial.

The Court: I understand that, but it don't appear that the witness needs to refresh his recollection on it up to the present time. Ask him about the subject that you have in mind.

Q. Did you see Mr. Turner raise his hand?

A. It was either his left or his right hand—I don't know which.

Q. What did he do with it?

A. Just motioned in that form there.

Q. Did you notice Stroud grab for Turner's club?

A. I did not.

Q. You didn't see that?

A. No sir.

Q. You saw the knife?
A. Yes sir.
Q. Where?
A. In Stroud's left hand.
Q. How long a time was occupied in these movements, speaking all together—taking it all together?
A. Well, I don't know how long it was. I don't know whether they were speaking at the time I was walking back, or not.
Q. You say the whole thing, in your judgment, didn't occupy more than twenty seconds?
A. Yes sir.
Q. It was not—it must have been done very quickly, then?
A. Yes sir.
Q. *Do you tified* at the first trial?
A. Yes sir.
Q. Do you remember of giving any testimony at that time about Stroud making any motion toward Turner's club.

Mr. O'Donnell: That is objected to as an attempt to impeach his own witness.

402 The Objection was by the court overruled, and to this ruling and action of the Court defendant then and there duly excepted, and still excepts.

A. No, I don't remember making any statement about the club.

Cross examination.

By Mr. Kimbrell:

Q. Mr. Whitlatch, you testified at the first trial of this case, didn't you?
A. Yes sir.
Q. And the matter was much fresher in your mind then than it is now?
A. Well, no; things were pretty exciting at that first trial.
Q. Things were pretty exciting at that first trial?
A. Yes sir.
Q. Then you testified also at the second trial?
A. I did.
Q. This is your third time.
A. This is the third time.
Q. —to testify in this case?
A. Yes sir.
Q. You never have gotten your testimony the same way twice, have you?
A. I could not say about that.
Q. You are not sure about that?
A. No. sir.
Q. Is that the fault of your memory, you think?
A. I have not been memorizing it at all.
Q. Now, you were in the other end of the aisle working opposite

guard Turner, weren't you—he had the front twenty seats next to the Captain's bench or twenty-two, and you had the same number back to the rear, and you had gotten back nearly to the rear when your attention was first attracted to Turner and Stroud—isn't that right?

A. No, my attention was not attracted at all until I turned around and seen them, as there was nothing done to attract may attention.

Q. And then you walked the distance from the rear back up to them before Mr. Turner fell?

A. No, I didn't get all the way back before he fell.

403 Q. Well, how near to Mr. Turner or Mr. Stroud did you get before he fell?

A. Well, I would say about eight or ten feet—about that distance.

Q. Now. did you see Stroud holding to Turner's club?

A. No, I did not.

Q. Did you see Stroud making an effort to get hold of Mr. Turner's club?

A. No sir.

Q. Did you see him grab for it?

A. No.

Q. Did you see Mr. Turner reach for his club?

A. No sir.

Q. You didn't see anything of that kind—now, I want to ask you if you remember that on that first trial of this case, Mr. Robertson examining you for the government, asked you this question, and if you made the answer I will read: "Question. Explain briefly to the jury what you saw and heard? Answer. I was detailed in the dining room on this day as a guard. I was in the aisle with guard Turner, in the rear of him. I marched to the rear end of the aisle and turned around and saw prisoner Stroud and guard Turner standing talking."—do you remember that?

A. I remember of seeing that.

Q. You took it that they had been talking, you don't know?

A. No sir.

Q. They were talking quietly?

A. I don't even know they were talking.

Q. You said they were talking there?

A. They seemed to be talking.

Q. That is, they were standing there with their lips moving, talking apparently in a friendly way?

A. Yes sir.

Q. "I started to move up the aisle"—you started to move toward them—I pass that statement without any question, because there is nothing different in that statement—that is true?

A. Yes sir.

404 Q. And how far did you walk back toward them as they stood there, tell the jury how far you walked back toward them?

A. Well, about twenty feet.

Q. And how were you walking—that is, leisurely along?

A. Just——

Q. Not exactly like a policeman, but walking slowly?
A. Not quite that fast.
Q. Tell us, when you were moving along the aisle, you were walking along and you walked toward these men, you observed they seemed to be talking and talking apparently in a friendly way?
A. They were facing each other—I don't know that they were talking.
Q. Their lips moved and nodding?
A. I don't know anything about that.
Q. I will ask you if these questions were asked you and you gave these answers; "I started to move up the aisle"—you moved along this 20 feet—I will ask you if you gave this description: "I saw Stroud grab for Turner's club, and when I got nearly up to them, within twenty feet of them, I saw Turner raise his hand and motion to the Captain"—did you answer this question in that way?
A. I don't believe I did about the club, I did about the hand.
Q. I will ask you if you remember Miss La Bar?
A. I do.
Q. You remember she reported your testimony on that occasion?
A. Yes sir.
Q. Do you say that you don't remember—do you say you didn't give that testimony?
A. I don't remember giving that testimony.
Q. You do remember that you walked down to the rear of the aisle and turned around and saw Turner and Stroud talking?
A. Standing in the aisle.
Q. Talking to each other or facing each other?
A. Facing each other.
405 Q. How near were they together standing there
A. About two feet apart, that is, between them, about two feet and facing.
Q. Was one standing toward you or——
A. No sir.
Q. Both men were uncovered to your view?
A. I could see them both.
Q. Side view?
A. Side view to the both of them—left side of Stroud and the right side of Turner.
Q. Seeing them, as you walked up toward them and they seemed to be talking there, did you notice them get any closer together?
A. No, I do not.
Q. Did you notice Stroud make any demonstration toward Mr. Turner?
A. No.
Q. Did you notice Stroud make any movement at all until Turner tried to draw his club?
A. I didn't see Turner draw his club.
Q. You deny that you testified here before that you saw Stroud grab for Turner's club?
A. No sir.

Q. "I saw Stroud grab for Turner's club"—you say you didn't say that?

The Court: You might ask him whether or not he denied that Stroud grabbed Turner's club.

Q. I read your testimony—do you remember giving that testimony?
A. Not about the club—no sir.
Q. You know General Boyle, do you?
A. I do—not personally; I know him when I see him.
Q. You met him on the trial of this first case?
A. Yes sir.
Q. And you remember that he cross examined you?
A. He did.
Q. I will ask you—to get the connection, I will read a few questions back—I will ask you if General Boyle asked you these questions and you made these answers: "And what was it attracted your attention to the fact that he was standing there talking to Turner? Just that you saw him? Answer: Just that I saw him.
406 Question: Just that you saw him. Do you know how long that he had been there talking when you observed it, before you observed it? Do you know how long he had been there prior to the time you observed him? Ans. I could not say. Question: Had you been walking on toward the west and had turned and was coming back? Answer: Yes. Question: When you turned and looked down this aisle you saw these two men standing there? Answer: Yes. Question: The first you observed, as I get you, as I understand you, if I am wrong you correct me, the first movement you saw between them was Stroud ahold of Mr. Turner's club? Answer: Grabbed for it. Question: Grabbed for it. —. And where was the club then? Answer: Turner had started to take the club from under his left arm. Question: With his right hand? Answer: Yes sir."—Now were those questions asked you and did you make those answers?
A. There are some of the questions there that he asked, that I remember of, but not the questions regarding the club—I don't remember that answer and those questions at all.
Q. You didn't make the answers in regard to the club?
A. I don't remember of it.
Q. Well, did you say—do you recollect these questions being asked you, and you answered in the way I will indicate, by the questions and answers: "Questions: The first you observed, as I understand you—if I am wrong you will correct me—the first movement you saw between them was Stroud ahold of Mr. Turner's club? Answer: Grabbed for it. Question: Grabbed for it. And where was the club then? Answer: Turner had started to take the club from under his left arm. Question: With his right hand? Answer: Yes sir."—Tell the jury whether those questions were asked you and whether you answered in that way?

A. I don't remember these questions being asked and
407 answered.

Q. If you answered in that way, were the answers true as you then remembered it?

A. No, they would not be.

Q. Now, that was in May, after this occurred in March, that you gave your first testimony here?

A. I don't remember the date of the trial.

Q. You say now, Mr. Whitlatch, you don't remember having testified that way—you remember on the second trial of this case, by the way, I read that testimony, and those questions and those answers and asked you if you answered that way—do you recall that?

A. I recall that you asked me—yes sir.

Q. I will ask you if you didn't then answer in this way: "Do you recollect testifying before that you did see Stroud grab Turner's club? Answer: No sir, I never. Question: Did you see anything of that kind then? Answer: No sir. Question: Did you swear that way before? Answer: No. Question: I will ask you if, in your testimony before, you testified that you saw Stroud strike Turner in the way you have indicated now? Answer: I said so in my other testimony and also in this. Question: I wish you would examine your testimony and point out wherein it occurs——" —did you answer those questions that way, in the second trial?

A. I believe I did.

(Witness excused.)

HOWARD BECK, being duly sworn as a witness on the part of the government, testified as follows:

Direct examination.

By Mr. Robertson:

Q. What is your name?

A. Howard Beck.

Q. Where do you live, Mr. Beck?

A. 1007 Ottaway.

Q. In Leavenworth?

A. Yes sir.

Q. Are you the holder of a government position at the Federal prison?

408 A. Yes sir.

Q. What is that position?

A. Guard.

Q. Were you occupying that position on the 26th day of March, 1916, when this occurrence happened between the defendant Stroud and Andrew F. Turner?

A. Yes sir.

Q. You were there in the dining room at the time?

A. Yes.

Q. Take the pointer behind you, at the wall there, and step this way, and show the jury where you were when that happened?
A. Right here, sir.
Q. Is this intended for your figure here, that one in the aisle?
A. Yes.
Q. And the occurrence happened over here?
A. Yes.
Q. Did you know guard Turner at that time?
A. Yes sir.
Q. Just relate the matter to the jury as you saw it there, what you saw happen between the defendant Stroud and Mr. Turner?
A. Well, I was patrolling the aisle, coming down toward the door, and I got down by the kitchen door and the men started to raise up in the aisle; I looked around and I seen Stroud and Turner standing there together, and it looked to me as though Stroud had Turner's club.
Q. In his hand?
A. Yes; and the men in the aisle started to raise up and I went right back to quiet the men down, and the next time I looked Mr. Turner was reeling falling on the floor, his club kind of raised up like that. I kept on up the aisle, and that is all I seen.
Q. That is all you did see?
A. Yes sir.
Q. Did you see anything at all there to indicate that Mr. Turner was making any sort of attack upon Stroud?
A. No sir.

Mr. O'Donnell: That is objected to as leading and suggestive—leading the witness.
409 The Court: I think that might possibly call for a conclusion rather than a fact—let him tell all the facts he knows about it, everything he saw.

Q. You were over in the last aisle, if I understand you, according to this diagram here?
A. Yes sir, the north aisle, nearest to the kitchen door.

Cross-examination.

By Mr. Kimbrell:

Q. Coming to the kitchen door, you turned back, did you, toward where Stroud and Turner were?
A. No sir; walked straight west on the same aisle.
Q. How is that?
A. Right back west on the same aisle.
Q. Were those men west of you—Stroud and Turner?
A. No sir, they were south of me.
Q. In a different aisle?
A. Yes sir.
Q. How many aisles between you?
A. Three aisles.

Q. You walked from the kitchen door about half way up the aisle before Mr. Turner fell, didn't you?

A. Yes sir.

Q. Now, I will ask you if, after you got to the kitchen door you didn't turn around and see Stroud holding Turner's club with one hand?

A. I could not tell how many hands he had.

Q. Well, didn't you see him first with one hand and didn't you later see he had both hands holding to that club?

A. No sir.

Q. Now, you testified in this case at the first but not at the second trial?

A. Yes.

Q. I want to ask you if these questions were asked you and if you described it then in this way: "Question: Just a little of it. Just -ell the jury what you saw and heard? Answer: Well, I was walking down the north aisle, down toward the kitchen door, and as I got to the kitchen door, I turned around and the men in the aisle
410 were standing up, and I case my eyes toward the south and I seen Mr. Turner and Mr. Stroud standing together, so I walked right up back the aisle to quiet down the men and I glanced over again and see Mr. Stroud standing there with his hand holding a stick, and I kept right on going to quiet the men down. Ques. Just explain what you noticed about the club as between Stroud and Turner? Answer: Well, I looked over, and Turner was facing this way, and it looked to me where I stood he had both hands on it." —did you testify that way?

A. I probably did, sir.

Q. Well, did you say that you saw as it appeared to you, Stroud holding the club with both hands?

A. Well, it appeared to me that way—yes sir.

Q. Well, you were where you could see, Mr. Beck?

A. No, I was about fifty or sixty feet away—I could not see so well.

Q. You could see Stroud's hands?

A. Yes sir.

Q. And you saw Turner's club?

A. Yes.

Q. And you did see both of Stroud's hands on Turner's club?

A. I could not say for sure.

Q. That is the impression you got of it at that time?

A. Yes sir.

Q. At that time you saw Stroud holding Turner's club?

A. I think he was, the way they stood, sideways.

Q. Stroud had no knife in his hand?

A. No sir—I could not say,

Q. You remember the captain coming down there later?

A. I did not notice him, sir.

Q. You didn't notice him?

A. No sir.

Redirect examination.

By Mr. Robertson:

Q. Did you see the knife at all?
A. No sir.

(Witness Excused.)

411 THOMAS ELLIOTT, called as a witness on the part of the government, being duly sworn, testified as follows:

Direct examination.

By Mr. Robertson:

Q. What is your first name?
A. Thomas.
Q. Elliott—Thomas D. Elliott?
A. Yes sir.
Q. Where is your home?
A. Oklahoma.
Q. Mr. Elliott, were you a convict in the prison on the 26th of March, 1916?
A. Yes sir.
Q. Do you remember the occurrence there between the defendant and the guard, Mr. Turner?
A. Yes sir.
Q. Did you know Mr. Turner at that time?
A Well, I knew him when I saw him.
Q. I wish you would just step over here, if you will, to this Exhibit 1, this diagram: Now, did you see Stroud signal to the guard to go out?
A. No sir.
Q. What was the first thing you saw?
A. The first thing I saw was Mr. Stroud and Mr. Turner standing in the aisle, and as I looked around, Stroud made a stab at Mr. Turner standing right about there.
Q. Were you one of the prisoners that were eating there then?
A. Yes sir.
Q. Where were you—on the diagram—with reference to Mr. Stroud?
A. (Indicating.)
Q. In front of him?
A. Yes sir.
Q. You may take your seat—first, tell the jury in your own way, what you saw and heard there?
A. Well, about all I saw was, I looked around here, and I saw Stroud stab Mr. Turner, and he made some remark—I disremember now, just what remark it was he made—Mr. Turner held his hand up for the captain to come, and I seen the blood flowing down the

aisle like, and I turned sick, and got permission to leave the dining room—that is about all I saw.

412 Q. You left the dining room sick?

A. Yes sir.

Q. Can you give the substance of what Stroud said, Mr. Elliott, as you understood it?

A. Well——

Q. Not expecting you to adhere to the exact language; just give your best recollection, if you can?

A. I don't remember just what it was; it was either, "God damn you, you won't report anyone else" or "By God, you won't report anyone else."—I don't remember which.

Q. When, in relation to his saying that, did he jab the knife into Mr. Turner?

A. Yes.

Q. When was it?

A. Just as he spoke.

Q. Just as he spoke he jabbed the knife into the man?

A. Yes sir.

Q. Did you testify at the first trial of the case?

A. Yes sir.

Q. And at the second trial?

A. Yes sir.

Q. Where did you say you are living now?

A. Oklahoma.

Q. What is your business?

A. Working now in the harvest field, at the present.

Q. For a farmer there?

A. Yes sir.

Q. Is that where you have always lived, in Oklahoma?

A. No, I was born in Texas.

Q. How long have you been in Oklahoma?

A. I have been in Oklahoma since 1902.

Q. You have gone back to the same place as you were sent to prison from?

A. Yes sir.

Q. What charge—was the technical charge on which you were sent?

A. Violation of the Mann act.

Q. Transporting a woman from one state to another?

A. Yes sir.

Mr. Robertson: Cross-examine.

413 Cross-examination.

By Mr. Kimbrell:

Q. Mr. Elliott, your partner was Mr. Costello?

A. Yes sir; we were jointly charged.

Q. That is, you and Mr. Costello participated in the same act, you were a prisoner and Mr. Costello was a prisoner?

A. Yes sir.
Q. And you were seated close together on the day of this occurrence?
A. Well, he was on the end of the seat back of me and I was the third man in from the aisle.
Q. How many men were in between you and your partner Costello?
A. There were two.
Q. You heard Mr. Costello testify, too, in the case?
A. No, I don't think I did. I left right after my testimony.
Q. Well, you testified at the first trial, did you?
A. Yes sir.
Q. And at the second trial?
A. Yes sir.
Q. Were you both pardoned the same day?
A. Yes sir.
Q. And they had you testify the second time?
A. Yes sir.
Q. You came here together, you were pardoned together and you left together?
A. Yes sir.
Q. And you testified to practically the same thing, didn't you?
Q. I could not say as to what he testified.
Q. But you heard some swearing at that time in the aisle, didn't you?
A. Yes sir.
Q. How?
A. Yes sir.
Q. You are not sure what those profane words were, are you?
A. No, I would not be positive, but——
Q. But you were positive when you testified the first time, weren't you?
A. As I am now.
Q. Well, what do you say now?
A. I am not positive what words it was he spoke.
Q. What?
A. I am not positive what words he spoken.
414 Q. I will ask you if on that first trial, you didn't put these words into Stroud's mouth, or say that he spoke these words—were these questions asked you and did you make these answers: "Question: Just explain to the jury what you saw in the dining room there, and what if anything you heard? Answer: Well, all that I saw, when I turned around Mr. Turner was partly turned toward Stroud, in a position that he was going to walk over and Stroud says: 'God damn—you will not report any one else,' and Mr. Turner said: 'What is that?' and he hit him with a knife"—did you testify to that?
A. I don't remember.
Q. Well you see at that time you knew exactly the words, or thought you did, didn't you?

The Court: Oh, I think it is only fair to say that; there is scarcely any man that can repeat the exact words that occur in conversation months ago. He may repeat the substance.

Mr. O'Donnell: We except to the observation of the Court at this time.

Q. I merely ask you if you did testify that way the first time?
A. I don't remember whether I testified that way or not.

Mr. Kimbrell: That is all.

Redirect examination.

By Mr. Robertson:

Q. Just a moment—you received a pardon, I understand from counsel, in this case?
A. Yes sir.
Q. Who handed you that pardon?
A. Mr. Robertson.
Q. Was that at the first trial or the second trial?
A. Yes sir, the second trial.
Q. The convicts testified on the first trial without objection being made?
A. Yes sir.
Q. Then the discovery was made that they could not testify.

Mr. O'Donnell: Defendant objects to this discovery as outside the record.

415 The Court: Sustained.

Q. How long before the second trial did you learn that you were to get a pardon?
A. The night before then, it was.
Q. Who did you learn it from?
A. Mr. Robertson.
Q. I told you?
A. Yes sir.
Q. Did anybody else ever tell you anything about it?
A. No sir.
Q. You never dreamed you were to get one?
A. No sir.
Q. And weren't you a surprised man when you did get it?
A. I certainly was.
Q. You never dreamed of it?
A. No sir.
Q. Did you ever disclose to, tell the facts to the warden or me what you have testified?
A. Yes sir.
Q. Did you tell them to the warden and did I come here and talk to you?
A. Yes sir.

Recross-examination.

By Mr. Kimbrell.

Q. Do you recall testifying at the second trial after Mr. Robertson handed you your pardon?
A. Well, I was here.
Q. And you do recall testifying, don't you?
A. I was on the witness stand, yes sir.
Q. I will ask you if you, there on the witness stand, you then described the matter in this way: "Question: Just take the pointer and tell the jury, in your own way what you saw and what you heard if you heard anything, between these two men? Answer: I was four seats ahead of Stroud here—sitting here—and the third man back, right here—the first thing I noticed, I was wanting something on my plate and I looked around over my shoulder like that, and Mr. Turner and Mr. Stroud was standing right out there, like that, and I heard Stroud say, 'Did you report me' "?
A. I don't remember.
Q. Did you testify that way on the second trial?
A. I don't remember that I did.
416 Q. Then I will ask you, did you testify: "I didn't understand what Mr. Turner said, whether he did or didn't; and Stroud said, 'By God, you will not report another man' and hit him with his hand out like that—with his left hand"—is that the way you described it on the second trial?
A. I don't remember whether it was or not.
Q. And you don't remember whether it is true or not?
A. I don't remember if that is the fact or not, no. If I testified that way, I suppose it is; I taken an oath to tell the truth.

Mr. Kimbrell: That is all.

Redirect examination.

By Mr. Robertson:

Q. I think I should ask the witnesses—not Mr. Elliott only,—in view of the questions asked by counsel, did the warden of the prison or anybody ever offer you any consideration to testify here?
A. No sir.

Defendant's counsel objected to the question as leading and suggestive, which objection was by the court sustained.

Mr. Robertson: That is all.

(Witness excused.)

The Court: The court will take a recess until 9:30 tomorrow morning.

And thereupon the court adjourned to the following morning, June 26, 1918, at 9:30 a. m. And at said last named hour and day, the trial was resumed, and the following proceedings were had.

RILEY COSTELLO, called as a witness on the part of the government being duly sworn, testified as follows:

Direct examination.

By Mr. Robertson:

Q. What is your name?
—. Riley Costello.
Q. Where do you live, Mr. Costello?
A. Anadarko, Oklahoma.
Q. What has lately been your business?
A. I have worked in the harvest the last two weeks.
417 Q. The harvest fields?
A. Yes sir.
Q. What do you work at regularly?
A. Oil mill.
Q. In an oil mill?
A. Yes sir.
Q. Were you a convict in the prison here on the 26th of March, 1916?
A. Yes sir.
Q. Were you there at the noon meal, at this occurrence between the defendant Stroud and Andrew F. Turner?
A. Yes sir.
Q. Sir?
A. Yes sir.
Q. I wish you would just step over here a minute and show the jury where you were (witness steps over to Exhibit 1.)
Q. Where were you seated at that time, assuming that the figure standing holding the hand up in the air is Stroud?
A. I was sitting on the outside of this seat there.
Q. The seat ahead of him?
A. Yes sir.
Q. That would be immediately next to where guard Turner stands here?
A. Yes sir.
Q. Be seated—you and the witness Thomas D. Elliott came to the prison together, didn't you?
A. Yes sir.
Q. Did you see Mr. Elliott that day there?
A. Yes sir.
Q. And at the time this happened, this occurrence?
A. Yes sir.
Q. Where did he sit from you?
A. On the row of seats right ahead of me.
Q. Ahead of you?
A. Yes sir.
Q. Now just state to the jury what you saw and heard there between the defendant Stroud and Mr. Turner?
A. Well, on Saturday evening before it happened on Sunday noon——

Q. You saw what occurred between them on Saturday evening did you?

A. Yes sir.

Q. What was it?

A. At the supper table Mr. Stroud was talking at the supper table and Mr. Turner walked up and asked him what his number
418 was, and Mr. Stroud gave it to him, and then——

Q. Did you hear any remarks of Stroud about that?

A. No sir.

Q. That was on Saturday evening?

A. That was on Saturday evening.

Q. This next occurrence was Sunday noon?

A. Sunday at noon.

Q. The next day?

A. Yes sir.

Q. And at the noon meal?

A. It was.

Q. Now, just tell the jury, in your own way, what you saw and heard there?

A. On Sunday at noon, Mr. Stroud started to pass out of the dining room and he got a little bit by Mr. Turner, and he turned around to him and he asked him if he reported him, and I understood Mr. Turner to say that he did, and he asked him if he was going to let the report go in, and I understood him to say that he was, and Mr. Stroud hit him, and Mr. Turner dropped his club from under his arm and motioned for the captain and I turned away then, and when I looked back Turner was on the floor.

Q. How did Turner motion for the captain—will you show it as you saw it?

A. He kind of raised his hand, and motioned for the captain — came down.

Q. Where was Mr. Turner's club, if you noticed?

A. It was under his arm.

Q. Did you see Stroud take hold of the club?

A. I did not.

Q. You didn't see that?

A. No sir.

Q. Did you have anything to do with taking Mr. Turner out of the room?

A. I started to take him out, and I released to one of the other prisoners—I don't remember who it was.

Q. You don't now remember who it was?

A. I don't remember who it was.

Q. Do you know another convict there that was known as John Burton, alias Dr. Burton and other names?

A. Yes sir.

Q. Was he present at that time?

A. Yes sir.

419 Q. Was he sitting near where you were?

A. Sitting right by the side of me.

Q. Right by the side of you?

A. Yes sir.

Q. State what he did in looking after Mr. Turner after he had fallen on the floor, or did you notice?

Mr. Andres: That is objected to as leading and suggestive.

The Court: I don't see anything important about that—speaking to counsel on the other side—whether they are leading or not. It is unimportant—the whole room was full of men. How does it appear on the face of it to be important?

Mr. Andres: It appears to be an attempt to pave the way for Dr. Burton to testify about that.

The Court: I don't see how one witness can ever pave the way for another witness.

Mr. Andres: To show that Burton saw it.

The Court: This witness could not testify that he did see it. What is the form of the question, now, Read the question.

(Question read.)

The Court: How do counsel on the other side suggest that an inquiry of that kind should be framed?

Mr. Andres: Inasmuch as this witness appears to be an intelligent man, the question can be asked him, after Mr. Turner fell on the floor, what occurred—was he taken away, or what occurred?

The Court: Of course he might state a great many things occurred and not refer to that particular man. (To Mr. Robertson:) See if you can comply with the suggestion of counsel in framing your question.

Mr. Robertson: That is all.

420 Cross-examination.

By Mr. Kimbrell:

Q. What is your first name?

A. Riley.

Mr. Robertson: I did want to ask him one more question.

(By Mr. Robertson:)

Q. How did you happen to be here at the prison?

A. It was committed under the Mann Act—transporting a woman from one state to another.

(By Mr. Robertson:)

Q. You and Mr. Elliott were sent up here together?

A. Yes.

(By Mr. Kimbrell, resuming:)

Q. Are you a married man, Mr. Costello?

A. No sir.

Q. Were you at the time of your offense?

A. No sir.
Q. Were you ever married?
A. No sir.
Q. Were you at the time you took this ride that resulted in your being up here?
A. No sir.
Q. You and your friend Mr. Elliott were sent up here because you and your friend Elliott took some ladies over into Kansas?
A. No, into Texas.
Q. Into Texas—you went south?
A. Yes sir.
Q. That was your trouble, anyway?
A. Yes sir.
Q. Just before you testified the last time, you were pardoned?
A. Yes sir, on the second trial.
Q. And so was Mr. Elliott?
A. Yes sir.
Q. You don't think that influenced your testimony in any way?
A. No sir.
Q. Now, Mr. Costello, you know guard Whitlatch?
A. I know him—yes sir.
Q. How close to this occurrence was he standing, if you remember?
A. I don't remember.
Q. You know guard Howard Beck?
A. Yes.
Q. And do you know how close he was standing to this?
A. No; I didn't pay any attention.
421 Q. You say you noticed this affair from beginning to end?
A. Yes sir, I remember it.
Q. You tell the jury that the defendant here never reached for Turner's club as Turner was drawing it from under his arm?
A. I never noticed it if he did.
Q. Nothing of that kind occurred?
A. Not that I seen.
Q. You tell the jury that this defendant here didn't grab that club with one hand and then with both hands before he struck any blow?
A. Before he struck—no sir, he didn't.
Q. That didn't occur?
A. No sir.
Q. Now Saturday night you say there was a conversation between Turner and Robert Stroud the defendant?
A. Not much of a conversation; Mr. Turner just walked up and asked him what his number was.
Q. You were sitting beside Stroud?
A. Right in front of him.
Q. Did he speak loud?
A. Loud, yes sir.
Q. What was he discussing?
A. I paid no attention: he was always talking.

Q. He was always talking?
A. Yes sir.
Q. He was talking about as usual this dinner time, was he?
A. Yes, he was talking at dinner time.
Q. And Mr. Turner asked him for his number?
A. He asked him for his number the night before that.
Q. I am asking you about the night before, when this occurrence took place at the supper table—was there any other conversation between Turner and Stroud except Turner says, "What is your number"?
A. That is all I heard.
Q. And Stroud said,"8454"?
A. I don't remember what his number was.
Q. You don't remember anything else they said that Saturday night before?
422 A. I paid no atention.
Q. Now the next day, and just before Mr. Turner was killed, how long were they talking?
A. I don't know—I don't understand your question.
Q. How long were they talking just before the killing?
A. Mr. Turner and Mr. Stroud?
Q. Yes sir?
A. Two or three words passed between them.
Q. How long were they talking?
A. I could not say; I didn't have no watch.
Q. How close together did they stand as they talked?
A. Well I should judge a couple of feet apart—they were not very far.
Q. Who spoke first?
A. Mr. Stroud.
Q. Yes sir—and asked him if he reported him?
A. Yes sir.
Q. And what did Turner say after that?
A. I understood him to say that he did.
Q. Did you understand him correctly—did he speak distinctly?
A. That is the way I took it.
Q. That is not the question—we want what you heard and not the way you took it—did you hear it?
A. That is what I understood him to say—yes.
Q. Are you sure that you understood it or are you in doubt about it?
A. I believe it, in my own mind that is what he said.
Q. It is a belief in your own mind rather than a distinct recollection of what you heard, is it—a conclusion that you draw, is that what you mean?
A. Yes sir, in a way.
Q. But you are sure that Turner replied as you have indicated, is that what you mean?
A. Well, I am pretty sure of that.
Q. How close were you and your friend sitting together?
A. Elliott, he was sitting on the seat right ahead of me.

Q. How close were you to Turner and Shroud as they
423 carried on this conversation?

A. They were just about middle-ways of that aisle.

Q. Did you think or consider that Mr. Turner was mad or that he got mad during the conversation?

A. Mr. Turner?

Q. Yes.

A. No, he didn't seem to be mad.

Q. Did either of the men seem to be mad?

A. Well, no, I didn't notice they were at the time they were talking.

Q. And after Turner made answer to Robert's inquiry, what did Robert say?

A. What did Robert Stroud say?

Q. Yes?

A. I understood him to say that he would not report anybody else and he hit him.

Q. Did he use any profane words?

A. Not that I understood, no.

Q. Don't you know that he didn't?

A. Well, I didn't understand it that way, no.

Q. Have you ever talked with your friend Elliott about the words he used?

A. No sir.

Q. Have you ever discussed it with Elliott?

A. What he said?

Q. This question of the conversation between these two men?

A. No sir.

Q. You saw him frequently and talked with him about the time of this occurence, didn't you?

A. Yes sir.

Q. And when you came to the court house to testify on the two instances, he came in the same wagon, didn't he?

A. Yes sir.

Q. And you say neither of you ever mentioned it to the other?

A. No sir.

Q. Stroud was behind you?

A. Sitting right behind.

Q. When they were standing there talking?

A. No sir, just about by my side.

Q. How near to you then, how many feet, if you can tell?

A. Out about middle ways of that aisle.

424 Q. About three or four feet, you mean?

A. Well, I could not say as to that; I never measured the aisle to tell just how far it was.

Q. Do you tell me you cannot give an estimate how far they were from you?

A. From five to six feet, I guess—maybe a little bit further.

Q. Your seat was in front of Stroud's seat, was it?

A. Yes.

Q. What distance between you?

A. Mine and Stroud's seat?
Q. Yes sir?
A. I sat in the third tier south of the aisle just ahead of him; he was the man directly back of me in that row.
Q. Was there another seat between yours and his?
A. No sir.
Q. You were on the same seat with him, were you, or were you across the aisle from him?
A. I was on the same row of seats running this way, but one seat ahead of him.
Q. Were you on the seat ahead of where Robert was?

Mr. Robertson: He just tole you that he was in the seat ahead of him.
A. I was on the row of seats ahead of his.
Q. Was his bench immediately in front of yours or in the rear of it?
A. His was in the rear of me.
Q. Was there a bench between you too? Between your bench and his bench?
A. I don't understand your question, but I can show you.
Q. No, just tell about it; you know where you were sitting and where he was sitting. Now, was there a row of seats between you?
A. No, there was no row of seats between us.
Q. Then he sat immediately behind you, didn't he, in the bench that was immediately behind your bench or seat?
A. Yes.

Mr. Kimbrell: That is all.

Redirect examination.

By Mr. Robertson:

Q. Counsel has asked you something about being pardoned
425 —did you receive a pardon at one time?
A. Sir?
Q. Did you receive a pardon?
A. Yes.
Q. Who gave it to you?
A. I believe you did.
Q. Now did you testify at the first trial of this case, back in May, 1916?
A. I did.
Q. And did you have any pardon at that time?
A. I did not.
Q. Were you taken back to the prison after you testified then.
A. I was.
Q. Did you remain in the prison up until May, 1917?
A. I did.
Q. Then did you get a pardon from me, or receive one in May, 1917, at the second trial of this case?
A. I did.

Q. How long before I handed you that pardon did you understand you were to get one?
A. The night before.
Q. Did you understand that you were to be favored in this way until the night before you testified in that trial?
A. No sir.
Q. Had you had any reason to believe or expect you would get anything of that kind, Mr. Costello?

Defendant objected to the question, which objection was by the court sustained.

Mr. Robertson: That is all.
Mr. Kimbrell: That is all.

(Witness excused.)

JOHN BURTON, called as a witness on the part of the government, being duly sworn, testified as follows:

Direct examination.

By Mr. Robertson:

Q. What is your name?
A. My name at the time I was at the prison was Burton, John Burton.
Q. Are you Dr. H. S. Britton?
A. I am, sir; that is my correct name.
426 Q. Were you an inmate of the prison here on the 26th day of March, 1916?
A. I was, sir.
Q. Did you see something of the occurrence there that day?
A. I did sir.
Q. Sir?
A. I did.
Q. Did you observe the occurrence between guard Turner and defendant Stroud on the evening before?
A. At supper time—yes sir.
Q. At supper time on Saturday?
A. I did, sir.
Q. What was it you observed at that time?
A. I sat at supper directly in front of Mr. Stroud and his companion by the name of White, and Mr. Stroud and the gentleman whose name I gave were talking rather loudly without any regard for the rules and Turner in patrolling the aisle noticed them, and Mr. Stroud being next to him he asked him his number, and he jotted it down on a piece of paper as he walked away. After he left, Stroud made some remark that I didn't understand at the time. Stroud said, "If he shoots me, I will take care of him."
Q. Tell the jury, if you know, what the word "shoot" means in prison parlance?
A. The word, "shoot" in the United States prison means prac-

tically "to report" a man. It is a relic of the days when the prison was a military prison.

Q. The next day on Sunday the 26th day of March, 1916, at the noon meal, where were you seated in reference to the defendant Stroud?

A. I was directly in front of him and his partner Mr. White.

Q. I wish you would tell the jury, what, if anything, you noticed or heard regarding the occurrence there between the defendant Stroud and guard Turner at that time?

A. While I was eating, I was aware of the fact that somebody at my back was arising to get out in the aisle and walk out. I glanced around and noticed that Mr. Stroud was walking up
427 the side nearest me, toward the front, toward the Captain's desk. As he got where Mr. Turner, guard Turner was patrolling up and down, he comes a little in front of Mr. Turner, walks on and turns back and then he asks him, "Turner, did you shoot me?" Guard Turner says, "No, I didn't," just about in the same tone of voice that I am using to you, "No, I didn't." With that—I had been looking for some trouble, having heard the threat the night before—I thought the trouble was all over and I went back to eating my dinner. Hearing a commotion in a moment—really I could not specify the time,—I looked up again and saw the captain proce-ding from his desk in front, walking down rapidly to where guard Turner was staggering and fell. As the captain came down guard Turner was drawing his club from underneath his arm just like that, put up his hand weakly and Mr. Stroud was dancing around in front of him in a radius of a quarter of a circle, you might say, and Mr. Turner was weakly shoving out his club like that, as it were to ward off an attack from Mr. Stroud.

Q. Did you observe Stroud take hold of the club?

A. No sir; and the next I observed, if I might proceed, Mr. Robertson, Mr. Turner tumbled and fell and struck his head against the back of the seat, and I being a physician, jumped up and endeavored to help him. I and several other men carried him out and carried him to the hospital.

Q. Was he living while you were with him?

A. He made an attempt several times to speak, and the blood gushed from his nose and mouth, and he didn't succeed, and we took him over to the hospital, and he died there just before I left.

Q. Were you present when he died?

A. I was just going out of the room when they said he was dead.

Q. What is your business now?

A. My business is manufacture of automobile trucks.

Q. When were you released from the prison?

A. I was released at the second trial—pardoned.

428 Q. Something over a year ago, you were pardoned?

A. A little over a year ago.

Q. A little over a year ago?

A. Something like that.

Q. And what have you been doing since?

A. I have been Vice President and chief engineer of the American Motor Truck Company.
Q. Where is that?
A. Chicago.
Q. Have you since then been to Europe on business?
A. I have, sir, in the employ of the British government.
Q. What were you in the prison for?
A. I was charged with larceny.
Q. Were you guilty of the charge?
A. I was.
Q. How many prison terms have you served?
A. Several terms, sir.

Mr. Robertson: You may inquire.

Cross-examination.

By Mr. Kimbrell:

Q. You go by the title of "Doctor, do you?
A. I am an educated physician, trained.
Q. Did you ever study medicine in this country?
A. I graduated from the university at Heidelburg, Germany.
Q. What course did you study in Heidelburg?
A. I don't remember all the——
Q. A regular course in surgery and medicine?
A. Yes sir.
Q. How long was your course of study there?
A. Three years and a half.
Q. Did you get a diploma?
A. I have it to this day, sir.
Q. You have it with you?
A. I don't generally carry things of that kind about with me.
Q. How long since you saw it, doctor?
A. A short time ago.
Q. Where did you keep it while you were in prison?
A. Kept it with my wife, sir, with my papers.
429 Q. Where were your papers?
A. With her in London.
Q. Does she live in London?
A. Yes sir, she is in Chicago at present.
Q. You live but little in this country?
A. Sir?
Q. You live practically but little in this country?
A. I have been here a considerable part of the time.
Q. You have been abroad a great deal?
A. Yes sir.
Q. There for the British government?
A. Employed by the British government.
Q. How long have you been so employed?
A. While I was in the prison, sir, I devised certain things that became of interest to the British government, and after I got to

Chicago, I completed my arrangements with them. The Warden can testify to that fact, sir,—the Warden can probably testify to that.

Q. A great many of you prisoners were inventors, weren't you?

A. Possibly.

Q. Now, you say you never brought over your diploma from Heidelburg?

A. I never expected to practice in this country—never tried to practice in this country. Probably if I had, I would have brought it.

Q. Why didn't you expect to practice here?

A. There was no neces-ity for it, sir; I was also trained as a mechanical and civil engineer and was in the vehicle manufacturing business up to 1896.

Q. You say you are a civil engineer?

A. Am a mechanical engineer, too, sir.

Q. You have given considerable attention to mathematics?

A. Yes sir.

Q. I believe you testified on your previous examination that you could not attempt to state the number of times you had been in prison?

A. I can't say that I said that.

Q. How many times have you been in prison?

430 A. I could not tell—would not attempt to estimate it—I am desirous of forgetting those things, sir.

Q. Can't you estimate the number of times you have been in prison?

A. Probably three or four times.

Q. Three or four?

A. Yes sir.

Q. You can not tell the number between this and your first time?

A. I can not exactly, sir.

Q. Is your memory good?

A. Fine.

Q. And you recall you were guilty?

A. Those are things I desire to forget.

Q. Can you recall where you were—where you were first in prison?

A. No sir, I can't remember where.

Q. Can you recall for what offense you were first in prison?

A. Not at this moment, I cannot, sir.

Q. Can you recall now where you were in prison the second time?

A. I was in Singsing prison.

Q. Do you remember for what offense you were in?

A. Yes, sir, I do—larceny, sir, of fifteen thousand dollars' worth of diamonds.

Q. Diamonds?

A. Yes sir.

Q. Were you in the diamond brokerage business then?

A. No sir.

Q. The third offense—do you recollect your offense when you were the third time in prison?
A. No sir, I can't say that I can.
Q. Do you recall the place of your imprisonment?
A. I think that was Singsing, too, sir.
Q. Do you recall how many times you were at Singsing?
A. Twice, sir.
Q. What was your second offense, the second offense for which you were sentenced to Singsing?
A. That was larceny.
Q. Of diamonds?
A. I cannot recollect, sir. I can't tell anything about it. But I remember the diamond matter plainly.
Q. Was it for house breaking, doctor?
A. No sir.
431 Q. What was it?
A. I told you; it was for diamonds.
Q. I am talking about the second time, doctor, if you can recall the offense for which you were sentenced to Singsing the second time?
A. I can't recall it.
Q. Now, the fourth time—what offense did you commit?
A. Larceny, sir.
Q. Can you recall when you were imprisoned, then?
A. I can't recall.
Q. How old were you then?
A. I can't recall.
Q. Was that a diamond deal?
A. I can't recall that either.
Q. Can you recall where you were imprisoned the fourth time?
A. That was in this prison here—wasn't it?
Q. You were sent from where, doctor?
A. Washington, D. C., sir.
Q. Did you wait on Mr. Turner after he was carried out to the hospital?
A. Sir?
Q. Did you wait on him?
A. Did I wait on him?
Q. Yes?
A. I carried him out to the hospital.
Q. Who assisted you?
A. Three or four of the young men there.
Q. Did you strip him?
A. No sir, I turned his shirt down there.
Q. Did you find his glasses?
A. No sir; I didn't hunt for them—I was more anxious to assist him.
Q. Did you see any glasses on his eyes?
A. He was wearing glasses when he was patrolling up and down the aisle.
Q. Did you see the glasses after the occurrence?

A. No sir.

Q. Were they on his face when you were assisting to carry him out?

A. They were not on his face when I saw him, assisted him.

Q. Did you see the glasses on the floor or anywhere about?

A. No sir.

Q. When did you first see that he was wearing glasses?

A. I noticed him wearing the glasses on that day.

Q. If the man had on glasses that day, it was the first time you ever saw him wear glasses? 432

A. It was the first time I noticed them.

Q. You had seen him every day?

A. No sir, not every day.

Q. He was a man whose eyesight was apparently good?

A. I can't say as to that; I can only say that I saw he was wearing glasses that day the first time.

Q. Was this that night when he took Stroud's number, or the next day?

A. It was that day—the day he was killed.

Q. It was the day he was killed—do you recall what kind of glasses they were?

A. I can't recall them sir—whether they were pinc-nez or—whether they were nose glasses or spectacles—I know he wore glasses.

Q. Did you, or did you see anybody else, make a search about where he had fallen, for glasses?

A. No sir, we took his body immediately out for medical attention—we didn't look for anything.

Q. You never did see any glasses on his nose after he fell, whether they fell off or whether he didn't have them on, you don't know?

A. All I thought of was to try to staunch the blood roughly until we got to the hospital.

Q. Now, doctor, what was it you heard Robert Stroud say, the night before to Turner?

A. Officer Turner walked up to him and asked him "what is your number?" Mr. Stroud told him his number, and guard Turner took out a little bit of paper that he carried in his pocket, and walked about his patrolling up and down and said no more. As he passed me—as officer Turner passed me, going up the aisle, the companion of Mr. Stroud that he had been talking to, made some remark that I don't recall at this moment.

Q. What was it? 433

A. I don't recall, sir, and Mr. Stroud said distinctly, "If he shoots me, I will take care of him."

Q. How near were you sitting to Stroud, then?

A. In front of him, eighteen or twenty inches, I should judge.

Q. Did you turn around when he was talking?

A. I just deliberately looked at him, in order to induce him to stop talking, because I saw the officer coming down the aisle.

Q. Now, the next day, prior to this killing, did you see Mr. Stroud leave his seat?

A. You mean the day, I suppose, that Turner was killed?

Q. Yes, just before that killing?

A. He was sitting back of me, and I noticed somebody get up—I was the second man on the aisle—he passed up the aisle beside me, in that leisurely, sinuous way that he has.

Q. Which way did he walk?

A. Straight up toward the Captain's desk.

Q. You are sure that he first walked up toward Captain Purcell's desk?

A. That is what I saw, sir.

Q. And was your eyesight good?

A. Excellent with glasses, sir.

Q. He had to pass you to get up there?

A. I saw him pass.

Q. You saw the sinuous movement?

A. Saw his undulating, sinuous movement.

Q. You remember that distinctly?

A. I remember that distinctly.

Q. How far up toward the Captain did he get, toward the Captain, before stopping?

A. I should judge he went after he passed me, twelve—or 15—feet.

Q. Now, you are sure that Turner was not down to the rear of you?

A. I cannot say where Mr. Turner was when he started out—I can't say, until he turned around and I saw him and heard the man say, "Did you shoot me?"

Q. How far up towards the front was he from you when he met Stroud?

434 A. I should judge, when I first saw Mr. Turner and this man, with this man, I should say that Mr. Turner was about twelve feet from me.

Q. That would place him about opposite about what tier of seats?

A. That would place him about fifteen or eighteen feet from the front of the dining room.

Q. And twelve feet from you?

A. Twelve feet from me I should say, and about one-third of the length of the dining room down.

Q. Was the band playing?

A. The band was playing. I remember distinctly the piece they were playing.

Q. We have been anxious to know that—what is the name of the piece?

A. "In Paradise." We commented on it afterwards.

Q. They were still playing "In Paradise" when this conversation took place, occurred?

A. They were playing "In Paradise" when this matter occurred.

Q. They were playing "In Paradise" when this conversation occurred between these two men?

A. They were, sir.

Q. How many pieces were there in the band?

A. I could not tell you sir; I never counted them.

Q. What was the conversation?

A. I heard Mr. Stroud say, "Did you shoot me?" "No, I didn't," replied guard Turner.

Q. Now, to refresh your memory, I will ask you if he didn't say, "Did you report me?"

A. I never heard that word used in the prison.

Q. The reason I ask is because some of the other witnesses used that word—did you hear the word used—"Did you report me?"

A. He said, "Did you shoot me?"

Q. Did you hear the other word used?

A. I only heard the remark used, "Did you shoot me?"

Q. In what tone did he say that?

A. Well, to be fair to Mr. Stroud, I didn't notice any other tone than that he ordinarily did—a quiet tone.

435 Q. Now, what was the reply that Turner made?

A. Turner said, "No, I didn't."

Q. Turner spoke quietly?

A. He spoke in the ordinary tone that one would use—there was no anger in it.

Q. There was no anger in Stroud's voice when he asked the question?

A. No, neither one of the two.

Q. Just, "Did you report me?" and a quiet reply from the other man?

A. Not, "Did you report me," but, "Did you shoot me?"

Q. And you didn't hear, "Did you report me"?

A. No, I didn't.

Q. Did either man appear to be angry there?

A. I didn't notice any temper in Mr. Stroud or in Mr. Turner; that is why I thought all the trouble was over and started eating my dinner.

Q. Did you notice any attempt on Turner's part to draw his club?

A. Not at that time, sir.

Q. Do you know guard Whitlatch?

A. I do.

Q. Did you know guard Beck?

A. I do, sir.

Q. Did you notice where they were standing at this time?

A. I didn't notice where they were standing, I attend to my business.

Q. I notice that, doctor——

Mr. Robertson: I object to any polite remarks.

Mr. Kimbrell: I don't know anything else to say.

Q. Did you see guard Turner reach for his club and see Robert grab at the club or grab for the club, as Turner was pulling it from under his arm?

A. If you will let me tell you—that is not a fair question——

The Court: Answer the question and say nothing except in re-

sponse to the question and stop when you have answered the question.

A. Your honor, may I just say this——

The Court: No, we don't care to have any discourse—you are simply a witness.

436 A. Your question, if you please?

Q. Did you see guard Turner reach for his club, and as he was withdrawing it, did you see Robert Stroud grab at it or grab for it?

A. When guard Turner was falling——

Q. Don't make a speech, doctor—just answer the question?

A. I am answering you; just in order that you may see it——

Q. Am asking you if you saw it or not?

A. I saw a part that at another time, so, I cannot categorically answer your question without stultifying both the truth and myself.

Q. I will ask you this question, Did you see Robert Stroud first with one hand holding the club and try to bear it down and then with both hands?

A. I never saw Mr. Stroud touch the club, sir—I can't say I did—at any stage of the game.

Mr. Kimbrell: I think that is all.

A. Are you through, sir?

Mr. Kimbrell. Yes.

(Witness excused.)

WILLIAM JAMES POLLARD, called as a witness on the part of the government, being duly sworn, testified as follows:

Direct examination.

By Mr. Robertson:

Q. What is your name, please?

A. William James Pollard.

Q. Where do you live now?

A. In Denver, Colorado.

Q. In Denver?

A. In Denver.

Q. Were you an inmate of the prison on the 26th of March, 1916?

A. I was.

Q. And were you in the dining room at the noon meal that day, when this occurrence happened between the defendant Stroud and guard Andrew Turner?

A. Yes sir.

Q. What is your business, Mr. Pollard?

A. I am a steel worker by trade; I am working in a flour mill at the present time.

Q. A flour mill in Denver?

A. Yes sir.

437 Q. Where were you, at that noon meal, from Stroud?
A. In front of him.
Q. How far?
A. About three or four rows.

The Court: Speak a little louder, so that the far gentleman can hear you.

A. About four rows.
Q. You knew who guard Turner was at that time?
A. Why, yes, sir.
Q. You knew he was one of the officers there at the prison?
A. Yes sir.
Q. Did you know there was a man in the prison by the name of Stroud at that time?
A. Yes sir.
Q. You knew he was there?
A. Yes sir.
Q. Just go ahead and tell the jury in your own way, what you saw and heard there between the defendant Stroud and Mr. Turner—talk loud enough so that Mr. Wooley over there can hear you—Mr. Wooley, I believe his name is.
A. Well, we all faced the front—we are supposed to face the front at dinner. These two men—there was loud boisterous talking going on and attracted my attention to turn around. I turned in this position, just merely for an instant, and I saw Stroud and Turner talking, and of course it being a rule to report you for turning around, I turned my head to the front right away and the next thing I saw, I turned around again and the captain was down there—Captain Purcell—and he was motioning for us to come out, so I got up and went out to Mr. Turner and lifted him up and carried him to the hospital—that was practically all that I saw of it. We stayed with him until he died.
Q. What, if anything, did you notice about the manner or demeanor of either of the two men?
A. Well, I noticed more particularly that Stroud was boisterous, angry, provoked about something, but still Turner took the part of a guard, didn't get boist-rous, loud or anything.
Q. Did you see Mr. Turner's club?
A. Yes sir.
438 Q. Where was it when you saw it?
A. Under his left arm.
Q. What were you in the prison for?
A. White slavery.
Q. The Mann Act?
A. The Mann Act.
Q. Was that for the mere transportation of a woman from one state to another?
A. The mere transportation of a woman from one state to another.

Mr. Robertson: You may inquire.

Cross-examination.

By Mr. Kimbrell:

Q. Mr. Pe'lard, you saw Turner and Robert Stroud standing in the aisle talk ng together?

A. Yes sir.

Q. And you say that both men after talking a while, became angry?

A. They were angry when I turned around and saw him—I mean he was angry when I saw him—I only saw him the one time.

Q. You testified at the first trial of this case?

A. Yes sir.

Q. And the second trial?

A. Yes sir.

Q. And in both those trials you testified that both those men seemed *by* be mad, but finally that Robert seemed to be the angrier of the two?

A. No sir, I don't remember saying that.

Q. Is that a fact, as you remember it now?

A. As I remember, I said Stroud was the angry one.

Q. What is that?

A. As I remember, I said Stroud was the angry one.

Q. Didn't you say that Mr. Turner was mad too, or apparently mad?

A. No sir.

Q. How long were they talking before the men showed any anger?

A. Well, I could not say how long they were standing there talking.

Q. I will ask you if, on the second trial of this case, to refresh your memory about Mr. Turner's apparent anger, these questions were asked you and if you made these answers: "You then
439 (at the first trial) had no hope of pardon at all? Answer: No sir. Question: And no interest in it except to tell it as you saw it? Answer: That is all I have now. Question: Didn't you say then that the club was under Turner's arm and that Stroud was grabbing for it? Answer: Well, I know he was grabbing for it, but I can't just place where it was. Question: Yes—well, perhaps if you would refresh your memory—let me ask you this: was this question asked you at the former trial, and did you make this answer; 'You noticed that the conversation was animated? Well, I noticed in the conversation Mr. Stroud was more angry than Mr. Turner was'—did you say that? Answer: I did."—now do you recall making those answers at the first trial, since having your memory refreshed?

A. No.

Q. I will ask you if these further questions were asked you——

Mr. Robertson: Just one moment please. I have been trying to follow counsel; he asked, "did you testify thus and so at the first trial," and then at the second trial——

The Court: The question seems to embody a question and answer at the first trial—he said he made those answers—do you remember

making those answers at the first trial,—did you?

A. I forget the question; will you ask it again?

Q. At the first trial, was this question asked you, in this connection—and I will read the question—"Question: And didn't you then say that the club was under Turner's arm, and that Stroud was grabbing for it?"—that was asked you at the second trial about your testimony at the first trial—"Answer: Well, I know he was grabbing for it, but I can't just place where it was."—Now, do you remember that question being asked you at the second trial and answering it that way?

A. No, I don't.

440 Q. The matter was fresh in your memory, more fresh, when you first testified, Mr. Pollard, wasn't it?

A. Yes.

Q. And now again, I will ask you if you remember this question being asked you at the first trial; "You noticed the conversation was animated?" And your answer, "Well, I noticed in the conversation Mr. Stroud was more angry than Mr. Turner was."—do you remember that?

A. I know he was more angry—yes.

Q. And at the second trial, when I asked you those questions, when I asked you if you remembered testifying that way, didn't you answer, "I did"?

A. At the second trial?

Q. Yes; and you said, at the second trial, when I read you the question and answer I have just read you from the first trial, "I did"—don't you remember that I asked you that question and you answered it just the way I have read it?

A. I don't remember it now.

Q. Was this further question asked you at the second trial: "Now what did you mean by that, that between the two men, Stroud was more angry than Turner? Answer: Meant he was more angry—showed it more"—now did you answer that question that way, at the second trial—and this question was addressed to you, "Well both men showed something that leads you to say that the conversation was animated, that is they showed there was an angry dispute there, in their voices, didn't they?"—and did you answer, "Yes sir"?

A. I don't know what I answered that time—I know what I could say this time.

Q. Well, I want to get something of your memory about it now—now, do you remember answering that question I read in the way I read your answer—"Question—I will repeat it, and think about it, Mr. Pollard—you want to be fair, I take it—was this question asked you at the second trial—and having you go back in your memory now, to the incident, "Well, both men showed something that leads you to say that the conversation was animated, that is they

441 showed that there was an angry dispute there, in their voices didn't they"—and didn't you answer, "Yes sir"?

A. I can't recall it.

Q. Well, do you recall an angry dispute between the two men, now, as you think about it?

A. Yes sir.

Q. And you recall now, do you, from the voices of the men, that you realized that both were mad, didn't you?

A. Well, yes.

Q. And you remember now, don't you that after both men were in that angry dispute, that Turner reached for his club and Robert grabbed for it, don't you?

A. No, I don't remember anything like that.

Q. Do you know guard Whitlatch?

A. Yes sir.

Q. Do you know where he was standing that day?

A. No sir.

Q. You were in the court room when he testified the first time, weren't you?

A. The first time?

Q. Yes?

A. No sir.

Q. Do you know guard Howard Beck?

A. Yes sir.

Q. He was in the dining room during this killing, wasn't he?

A. I could not say, I am sure.

Q. Now, Mr. Pollard, let me ask you this question; now, after the angry beginning, after that angry row, judging from their voices of the anger between these two men, didn't you see Mr. Turner attempt to draw his club, and didn't you see Robert grab for it and caught hold of it with one hand and later with both hands, and try to hold the club?

A. No sir.

Q. Mr. Pollard, you are familiar with this map?

A. Yes sir.

Q. And you know this represents Captain Purcell's seat or throne, whatever you call it?

A. Yes sir.

Q. A raised seat—and this figure here is supposed to represent guard Turner as he gave permission to Stroud to retire—you understand that?

A. Yes sir.

442 Q. Now *hwere* was your seat with refer-nce to this figure here which represents Mr. Turner?

A. Down this way further.

Q. Up this way?

A. Yes sir.

Q. And were you on the outer seat on the aisle on the east?

A. The second seat in.

Q. The second seat in from the aisle?

A. Yes sir.

Q. And how many benches or rows were you forward from the figure that represents Turner?

A. Well, if that represents Stroud there, the man he is talking to, I was about four rows ahead of him.

Q. Yes sir; and how far up this way, if it was up this way, toward

Captain Purcell, were the two men when they had these angry words you told about?

A. They were right at the rear of me, as I was sitting at the moment, this way; they were standing this way here; all I had to do was just turn this way.

Q. Had they come nearer the row upon which you sat than the row on which Robert had been sitting—that is, had they advanced from the row on which Robert sat up toward you?

A. Robert?

Q. Robert Stroud?

A. Oh, yes they came up towards me, closer.

Q. I want to ask you, if, as you saw it, either Turner or Stroud, after the conversation between the two, while Robert was sitting here, ever retired toward the rear of the room?

A. I didn't see that part of it.

Q. All you saw and all you heard, occurred further up toward Captain Purcell's than the figure indicated of Turner here?

A. It would appear to me so, from all I saw and heard.

Q. How near to the two men were you, when you describe their conversation as an angry one?

A. Oh, I should judge about ten feet.

Q. Now, I want you to recall, if you can, something of the conversation?

A. I could not do that.

Q. I want to refresh your memory, if I can, did you hear
443 Robert inquire of Mr. Turner if he had reported him for that conversation at the table Saturday night?

A. No sir.

Q. To refresh your memory, I will ask you if he didn't ask that question and if Turner didn't reply that he had reported him, and if Robert didn't request him to withdraw it because his brother Marcus was here, and he had not seen him for a long time—do you recall anything of that kind?

A. No sir, I didn't hear the conversation at all, at that time.

Q. How near were you sitting to this man here that gives his name as Dr. Burton, if you know?

A. I could not say; he was in the rear o- me.

Q. Was he between your position and Stroud's position as you sat there in your seat?

A. Yes, I think he was, if I remember right.

Q. That is, you would feel sure that you were nearer these two men that stood talking there, than the doctor was?

A. No, I don't think so; I think he was nearer than I was.

Q. That is, he was further up in the seat?

A. No sir, he was between Stroud and me.

Q. Then, inasmuch as Stroud stood between your seat and the row of seats Robert had occupied, that proves the doctor was nearer to him than you—that is your view of it, is it?

A. That is my view of it—yes sir.

Q. Do you know Riley Costello?

A. Know of him—yes.

Q. Do you know his partner—Mr. Elliott?
A. Knof of him.
Q. Do you know where they sat with reference to the seat occupied by Robert—Robert Stroud?
A. Well, if these men were in their right places, they sat between Robert Stroud and myself.
Q. About how far from Stroud do you think they sat in feet—they are together here—two, three, four, five, ten feet or whatever it was?
A. I could not say as to that.
444 Q. Do you recollect that the band was playing when this occurred?
A. No sir, I cannot recall that to myself.
Q. Did you hear the testimony of Dr. John Burton——
A. No sir.
Q. Wherein he tells about that? I take it you didn't?
A. No sir.
Q. Did you ever see guard Turner wearing glasses until that day?
A. What?
Q. Did you ever see guard Turner wearing glasses, spectacles or glasses, until that day?
A. I didn't remember that he had glasses on that day.
Q. If he wore glasses, you don't remember ever seeing them—that is true, Mr. Pollard?
A. I could not say if he had them on that day or not.
Q. If he did wear glasses, as you recollect the man and his habits, it is a surprise to you, isn't it?
A. I could not say anything about that—I never paid enough attention.
Q. You knew some of the guards there that did wear glasses?
A. Yes sir.
Q. You knew Captain Purcell did *ward* glasses?
A. Only when he reads.
Q. But you knew of course that he wore glasses?
A. Yes.
Q. What other guards wear glasses, if you remember?
A. I don't remember any of them now.
Q. How old a man did Mr. Turner seem to be?
A. Oh, I should judge a man between thirty-five and forty.
Q. He was a man athletically built, wasn't he?
A. He was, yes.
Q. And a man somewhat given to boasting of his physical prowess?
A. Just a moral man—no boasting about him.
Q. Was he the kind of a man that, being the powerful man that he was, you would expect to hear boast of his strength?
A. I could not say; never talked with him enough to find
445 out.
Q. You never talked with him about that?
A. No sir.

Q. Did you know anything about his removal from Atlanta to this prison?
A. I don't know anything about that.
Q. Did you ever hear anything about that?
A. I heard of it—that is all.
Q. Did you hear anything about his record at Atlanta?
A. No sir.
Q. Did you hear any reference to his conduct up here, or about his conduct at Atlanta, about being hot tempered?
A. No sir.
Q. You never heard that discussed?
A. I never had anything to do with the men at all—I never did.
Q. I see. That is all.

Redirect examination.

By Mr. Robertson:

Q. I wish you would tell the jury what if anything you observed in the demeanor or Mr. Turner there at the time of this occurence?

Mr. Kimbrell: That is objected to as a repetition.
The Court: If he has not already told it—I don't care to have him repeat—if there is anything that he has not already spoken of, he may tell it.
Mr. Robertson: My idea is that it refers to something that has not appeared.
The Court: Anything, in addition, the witness may state.

Q. What I want to get at is, whether you observed anything in the demeanor of Mr. Turner at all that indicated that he was taking any aggressive action toward Mr. Stroud?

Mr. Kimbrell: That is objected to as a mere conclusion.
The Court: He may not state any conclusion. He may
446 state any motions or words or advancing or retreating—anything that he wishes to state in the way of fact, that he has not already stated—he may now state it.

Q. What if anything did you notice in the way of action on the part of Mr. Turner, in the way of making any motion or advance toward Mr. Stroud?
A. He didn't make any advance at all of any kind.
Q. What was Turner doing?
A. Merely standing there, when I saw him, with his club under his arm, this way—acting the part of a guard, is what I call it.
Q. Now, as I understand it from your answers to counsel, there was anger there—that is, it looked that way to you?
A. Yes.
Q. Was there any difference between the anger as to one appearing to be angrier than the other one appeared?
A. Stroud appeared to be the more angry.
Q. How long did you look at those two men back of you?

A. Just an instant—just long enough to look toward them and turn back.
Q. It was almost instantaneous?
A. Yes sir.

Mr. Robertson: That is all.

Recross-examination.

By Mr. Kimbrell:

Q. Was it the angry voices of the men that caused you to turn around to look that way?
A. It was the angry voices that caused me to turn around—I would never turn around for anything else.

Mr. Kimbrell: That is all, Mr. Pollard.
(Witness Excused.)

ALFRED FRANKLIN YOHE, called as a witness on the part of the Government, being duly sworn, testified as follows:

Direct examination.

By Mr. Robertson:

Q. Doctor Yohe, you are the physician of the prison, of the
447 United States penitentiary?
A. I am.
Q. How long have you occupied that official position?
A. Since January 9, 1906.
Q. Are you a regular, qualified and recognized practicioner of medicine?
A. I am.
Q. How long have you been?
A. Since 1888.
Q. You are also a surgeon, as well?
A. Yes sir.
Q. And you were at the prison upon March 26th 1916, at the time of the occurrence which resulted in the death of Andrew F. Turner?
A. Not at the time of the occurrence, no sir.
Q. How soon afterwards?
A. Within a very few minutes.
Q. Did you then and there, upon that day, examine the body of Mr. Turner?
A. I did.
Q. What examination did you make?
A. I examined the wound in the chest.
Q. What wound did you find?
A. A penetrating stab wound, in the second—entering the second interspace, directly to the left of the breast bone.
Q. Did you follow that wound into the body?
A. I did, yes sir.

Q. And where did you find it went to?
A. The wound penetrated the base of the heart.
Q. I wish you would state to the jury, if you can, whether that wound caused the death of this man?
A. Necessarily.
Q. It did?
A. Yes.

Mr. Robertson: That is all.

Cross-examination.

By Mr. Kimbrell:

Q. What do you mean by the "base of the heart"—the lower part?
A. You, I suppose, would call it the upper, the apex, to the left.
Q. It went to the center?
448 A. No, the breast bone is the center?
Q. Was that such a wound as would cause what we speak of as "instant death"?
A. To all intents, it would be instant death.
Q. Such a wound as that paralyzes the strength of the arm, the grip of the hand, does it not?
A. Yes, I would say so—it stops the pulsations of the heart, within two or three pulsations of the heart.
Q. A man with a would like that would not be able to retain and struggle over a club, would he, in your judgment?
A. He would be able to take hold of his club.
Q. But not wrest it from the grasp of a strong man?
A. That I would not express an opinion about.
Q. It would not be your judgment that a man wounded through the heart would have any strength of his hand, would he?
A. Momentarily, he would.
Q. And almost instantly he would sink, like that?
A. Within a matter of seconds.
Q. Was the direction downward, if you recall?
A. Downward, inward and backward, to the median line.
Q. Would you judge from the direction of the wound the man was leaning forward, or can you form a judgment about that from the direction of the wound?
A. From the direction of the wound, yes sir.
Q. Was he leaning forward when he was stabbed?
A. That I couldn't judge of. I know the direction of the wound, is all.
Q. Either the man must have been leaning forward when stabbed or the arm came from above and down?
A. Direction of the blow, yes.
Q. It was not such a would that a man would receive from a direct thrust upward, was it?
A. Not an upward thrust, no sir.
Q. You had treated Robert Stroud for a good many months before this occurrence, hadn't you?

A. Yes sir.

449 Q. You cured him—or thought you did—according to whether the cure was made—from Bright's disease?

A. The man recovered.

Q. And he had a pronounced case of Bright's disease?

A. Yes; a mild type of Bright's disease.

Q. Did you put him on diet?

A. It was the proper treatment.

Q. For how long was he on diet before this occurred?

A. That I could not recall, from memory.

Q. He had spent a great deal of time in the hospital?

A. A great deal of time up to several months prior to the occurrence.

Q. Doctor, you deemed his detention in the hospital necessary from the condition of the man, as you found it?

A. It was necessary, when the man was placed in the hospital, it was necessary, in my judgment.

Q. That is where you wanted him, in order to treat him for what you regard as a dangerous disease?

A. It was necessary, yes sir.

Q. That was the kind of disease that made a man thin, causes loss of flesh, wasn't it?

A. Yes.

Q. It was a kind of disease that severely strains a man's nervous system, don't it?

A. Sometimes it does and sometimes it does not.

Q. Well, usually it is considered a great strain on a man's nervous system, to be suffering from Bright's disease—is not that true?

A. Speaking in a general way, or in connection with this specific case?

Q. Now, Robert Stroud was at one time trying to take two or three educational courses, wasn't he?

A. I don't know about that.

Q. Did you advise him in his condition, to refrain from overmuch study?

A. I made no suggestion along that line, at all.

450 Q. You made no suggestion along that line at all?

A. Because I saw no evidence of it.

Q. He is much heavier now than he was then?

A. I should judge somewhat, yes.

Q. Then he was a thin, emaciated man, wasn't he?

A. Not much more than he is at present.

Mr. Kimbrell: I think that is all.

Redirect examination.

By Mr. Robertson:

Q. Doctor, when was the defendant last in the hospital, prior to the 26th of March, 1916?

A. I think some time in August of the year before.

Q. August of the year before?
A. Yes sir.
Q. Was he working then at the time of this occurrence?
A. Yes sir.
Q. What had been the matter with him?
A. He had nephritis, Bright's disease, popularly called.
Q. What was his condition on and after August, 1915, in relation to that nephritis?
A. The nephritis had cleared up except during days, cloudy days, he would have a trace of albumen in his urine, which warranted me in having him placed in quarters.
Q. What had brought on that condition?
A. In my judgment, an attempt to escape where he was exposed to superheat and afterwards chilling.
Q. Under what conditions was he exposed to that, to the heat?
A. In a sewer, in attempting to escape.

Defendant's counsel objected to the question, and asked that the answer be stricken out. The objection was sustained, and the answer stricken out, and the jury instructed to disregard it.

Mr. Robertson: That is all.

(Witness excused.)

451 THOMAS W. MORGAN, called as a witness on the part of the government, being duly sworn, testified as follows:

Direct examination.

By Mr. Robertson:

Q. What is your name?
A. Thomas W. Morgan.
Q. Are you Warden of the United States Penitentiary, at Leavenworth?
A. I am.
Q. How long have you held that position?
A. It lacks three or four days of being five years.
Q. You know who the defendant Robert F. Stroud is?
A. I do.
Q. And did you know who he was prior to the 26th day of March, 1916?
A. I did.
Q. And were you acquainted with the deceased, Andrew F. Turner?
A. I was.
Q. What official position, if any, did Mr. Turner hold there with you in that prison?
A. He was a guard.
Q. When did he begin service with you?
A. I don't remember the exact time, but some eight or nine

months before the killing—at least eight months, and I think about nine.

Q. You know the circumstances under which he came to your prison, do you?

A. I do.

Q. Where did he come from to this prison?

A. From the Atlanta United States prison.

Q. State the circumstances under which he came to you?

A. I might say first that the guards for the three Federal prisons, ours and Atlanta and McNeal's Island, are all certified from the same civil service list.

Mr. Kimbrell: We object to that.

The Court: Sustained.

A. (Starting to continue.)

Q. The court has ruled that you should not answer that.

A. I was about to proceed in a different way—I should
452 not answer the question at all?

Q. That is the ruling of the court. In prison language there, what place is referred to under "the Island?"

A. That is the prison at McNeal's Island.

Q. That is a Federal prison?

A. That is a Federal prison located on Puget Sound, near Takoma.

Q. In Washington—I wish you would state to the jury, if you can, what difference there was in stature, height of Mr. Turner and the defendant Stroud?

A. My recollection is that Stroud was about four, or five possibly, inches taller than Mr. Turner.

Q. Warden, was there a well recognized rule and custom of the prison, aside from any printed rules, that you have, upon the question of whether a convict may have in his possession and carry a knife or not?

Mr. O'Donnell: We make objection, if your honor please, the question is leading and suggestive, and furthermore immaterial and irrelevant.

The Court: Overruled.

And to this ruling and action of the court defendant then and there duly excepted, and still excepts.

A. There is.

Q. What is that rule?

A. The rule is that the convicts must not carry knives, and they are severely punished when found with knives like that involved in this case.

Q. There is a term that will be, I think, referred to along later—I want to ask you, Warden, what it means—what does "snitch" mean, as spoken of a convict?

Mr. O'Donnell: I move that the last answer be stricken out as irrelevant and immaterial.

The Court: Overruled.

And to this action and ruling of the Court defendant then
453 and there duly excepted and still excepts.

Mr. O'Donnell: Also object to this question because it is immaterial.

The Court: He says that evidence after this will make the answer material. All that we can do is take the word of counsel. If it is not, we will have it stricken out.

And to this ruling and action of the Court defendant then and there duly excepted and still excepts.

A. "Snitch" in prison parlance, is a prisoner who carries information to the officers of the prison. That can be subdivided a little further, if desired.

Q. How, in prison parlance, if you know, is that term applied in relation to what you know as a "trusty"?

A. Well, there exists in most prisons of which I have had any acquaintance, the idea among the prison bodies with those who are not "trusties" that the trusties are mostly snitches.

Q. Yes—what is a "trusty"?

A. A "trusty" is a man who is allowed to go about inside of the institution or outside of the institution, without the attendance of a guard or official.

Q. What, if anything, does a "trusty" wear that designates him—how is he distinguished from the rest of the prisoners?

A. He wears a star on his left breast.

Mr. Robertson: You may cross-examine.

Cross-examination.

By Mr. Kimbrell:

Q. Do you provide the prisoners at intervals with manicuring sets or any method of paring the nails or caring for their person?

A. Not as a general thing.

Q. About the only means they have of paring nails and
454 paring corns and attending to the person as some people do, is the cutlery they conceal,—that is true, isn't it?

A. I would not want to say that—no.

Q. There is a constant drain from the dining room of case knives, isn't there?

A. We have lost quite a number of case knives.

Q. And you usually find those ground down and made into cutlery of some kind by the prisoners, don't you?

A. We have found seven I think since this killing.

Q. And you missed a great deal of that cutlery before that killing?

A. Not a great deal: cutlery is checked up at the end of each

meal, and occasionally somebody will neglect his duty and a knife be taken away.

Q. After this killing, did you give an order, Mr. Morgan, letting the prisoners have safety razors?

A. Only on specified occasions and certain prisoners.

Q. You don't allow the prisoners to have a pocket knife—that is true is it?

A. No, we don't.

Q. You have no attendant, no manicure, nobody whose duty it is to pare their nails, finger nails, or care for the corns—there is nobody to look after them, attentions of that kind?

A. There is nobody makes it a professional duty. They bathe, shave——

Q. The point is, Mr. Morgan, there is no cutlery provided——

Mr. Robertson: He has not completed his answer.

The Court: If he desires to, you may call his attention to it later.

Q. The point is there is nobody whose duty it is to attend to these personal matters that everybody has to devote some time to each month, anyway?

A. We have barbers, and if a man's nails needed trimming he could have them trimmed by somebody—they do that.

455 Q. Barbers don't trim the nails, finger nails and toe nails, do they?

A. No sir, not regularly.

Q. The only cutlery they have is the cutlery they sometimes steal and buy of other prisoners, isn't it?

A. I think there are persons who trim nails, but we have no official manicurist for it.

Q. This man Turner was a man of something of your build, Mr. Morgan?

A. I think so, yes.

Q. A little taller than you?

A. I think not—a little shorter I think—that is my recollection.

Q. He was a man of apparent vigorous health, wasn't he?

A. As far as I could see, he was.

Q. Wasn't he a man who enjoyed a reputation for strength, for being an athlete?

A. I never heard anything about that, one way or the other.

Q. Was he a man that gave considerable attention to the development of his condition, his strength, his muscles?

A. No, I didn't hear that.

Q. Since this killing you include Robert in your special order; you allow him to have a safety razor?

A. Really, the matter of a safety razor is passed upon by the deputy warden, and I don't know, I have no knowledge whether or not he has a safety razor—I don't know in regard to that.

Q. Didn't he tell you in talking about this knife that that was the only means he had of taking care of his person was this case knife that he had formed into the knife that he used at the time Turner was killed?

A. No, he never did.

Q. Didn't he tell you that sometimes he had shaved with it, or had shaved with it?

A. He never did.

Q. Mr. Morgan, I think perhaps if you will refresh your recollection—I might lead to that by something I find in the record here——

A. I infer that he told me this at the institution; I heard
456 it stated here in the court, in counsel's statement to the jury.

Q. It is a matter that might have slipped your memory very easily, Warden, in your many duties, but in your testimony, I find this question and this answer—I want to read it to you, to see if you recall it—I think this question was addressed to you by General Boyle: "Question: Pardon me for interrupting, and did you answer substantially, 'when he told me that he made the knife himself, he said he made it in his cell with a file, he said he got the blade, took it from the dining room—took it or stole it from the dining room, I don't remember which term he used. I asked him where he got the leather and he said another prisoner stole it for him from what we call the "shoe shop;" and I asked him what prisoner, and he declined to tell."—Do you remember those questions being asked you and making those answers?

A. I have a vague recollection of something of that sort.

Q. Now, do you recall saying further that he told you that he had shaved with it and pared his nails with it—do you recall that?

A. He never told me anything of that kind—or he never told me anything of the kind prior to the trials that we had here; he may have told me that at some very recent date—I don't remember that.

Q. I was reading from the notes of the second trial then, Mr. Morgan; but I find this in your testimony at the first trial: "Question"—addressed to you by Judge Pollock—to get the connection I will read it here: "I asked him how he made it, and he said 'well' he made it as you have described—and General Boyle—objected and the Court, Judge Pollock, asked you then this question: "Did he state the purpose for which he made these knives? Answer: He stated the purpose for which he made his own knife. The Court: Very well. Answer. Shall I tell that? He said he wanted it to trim his nails, or to shave with occasionally, and trim his toe nails, or any other use like that"—do you remember
457 now giving those answers to Judge Pollock?

A. I don't remember the circumstances of telling that, but since this tragedy and since the trial, the prisoner said that, but he made no such statement to me prior to the first trial.

Mr. Kimbrell: That is all.

Redirect examination.

By Mr. Robertson:

Q. Counsel quoted a question to you like this—it having been asked of you by Judge Pollock at the first trial, "Did he state the purpose for which he made these knives?"—I wish you would explain to the jury or give to the jury the remainder of the conversation that brought that up?

Mr. Kimbrell: I object, if the court please, to any reference to the conversation, except the answers read to the Warden in cross-examination.

The Court: You mean the conversation that the witness had with the defendant?

Mr. Robertson: I mean the conversation that the witness had with the defendant, the portion of the conversation that counsel quoted from.

The Court: Fix the time and circumstances of that conversation.

Q. What was the time, the occasion and the time of this conversation that counsel has referred to?

A. I don't know that I could fix the date absolutely.

Q. Where did it happen?

A. Inside the prison; I had several conversations with the man, inquiring why he made the knife and why he killed Mr. Turner, and why he did this. It is impossible for me at this time to give the exact date of these conversations and almost impossible for me to give the exact language.

Q. Were they subsequent all of them to the commission of the offense?

A. Absolutely.

458 Q. And all in the prison?

A. Absolutely.

Q. Who were present?

A. I could not recall; there were many conversations—a number, at least—with the prisoner.

Q. Referring to this conversation you had with him from which this quotation is made, I wish you would go ahead and relate the remainder of the conversation to the jury?

A. Is that the second trial—it does not matter—I don't remember well enough—well enough to attempt to do it with accuracy at this time.

Q. You recall the conversation in which the court asked you "Did he state the purpose for which he made these knives"—now what brought that out—were you having a conversation with him regarding these knives?

A. Yes, I had a number of conversations with him in which he told me how many knives we had found after the killing of the same pattern all made in the same way, and he said different things at different times.

Q. Have you seen the knives themselves?

A. I have.

Q. Were they all of the same general pattern of the one that was introduced here?

A. All but one of them. The knife with which Jones killed Smith was a shorter blade.

Q Now you say you had a conversation at one time relative to the matter of the killing of this man, relate that conversation to the jury?

A. I asked him why he killed him—and he said he ought to have been killed, and I asked him why, and he didn't answer. It is hard to describe his conversation because sometimes he would answer and sometimes he would not; sometimes he would give a reason and sometimes he would not, and sometimes he would refuse to talk at all. He said sometimes——

Mr. O'Donnell: We object, if the court please. I would like to ask the witness a question as bearing on the objection.

459 The Court: Very well.

Questions by Mr. O'Donnell:

Q These conversations were in the isolation ward, or your office?

A. In the isolation ward or the office of the deputy warden; I didn't bring him into my office.

Q. The prisoner was in your custody and control?

A. He has been for five years.

Q. You took him into your office for the purpose of asking him about this matter?

A. I did not take him into my office.

Q. Into the deputy's office?

A. Into the deputy's office sometimes.

Q. And you did this for the express purpose of asking him about those matters?

A. Well, most of the conversations were in the isolation room and sometimes he was in the deputy's office.

Q. And there was nobody present but yourself and the deputy warden at these conversations?

A. I don't remember—sometimes I think we were alone and sometimes I think a guard was present.

Q. And he was then at this time in the isolation ward, under punishment?

A. Not under punishment—under restraint.

Mr. O'Donnell: We wish to suggest under the authority of Barton v. United States in the 168 United States, any conversation between the prisoner and Mr. Morgan is incompetent, irrelevant and immaterial, because he was under control and compulsion.

The Court: I don't recollect the Barton case as having any application here at all. The objection will be overruled.

And to this ruling and action of the court defendant then and there duly excepted and still excepts.

460 (By Mr. Robertson, resuming:)

Q. You may proceed to tell what he said to you—(Miss La Bar, the government' sstenographer: Miss La Bar, can you refer to it?

The Court: You better put a new question.

Q. The general line that was being asked you was what he said, what reason he gave for the killing of the man?

Mr. O'Donnell. That is objected to. We object to the question for the reason that to permit the witness to answer would be a violation of the defendant's rights under the Fifth Amendment to the Constitution of the United States.

The objection was by the Court overruled, and to this ruling and action of the Court defendant then and there duly excepted and still excepts.

A. Well, he would talk in various ways, in several conversations. Sometimes he would not say at all and sometimes he would act in what might be called a knowing manner, and on one occasion my best recollection is, I think this was perhaps two years ago, that he stated he had cause to kill him, and I asked him what the cause was, and he declined to tell me.

Mr. Robertson: That is all.

Recross examination.

By Mr. Kimbrell:

Q. Mr. Morgan, in all these conversations he told you that he had a defense that if the jury knew it as he knew it, he would be justified, didn't he?

A. I don't think—I don't think that he just told me that; I read that, something substantially like that in a letter he wrote to some friend.

Q. In the letter—now in his conversation, with you, didn't he tell you that if guard Whitlatch and Guard Beck would freely state the difficulty, a jury would acquit him?

A. No, I don't remember that.

461 Q. Didn't he call your attention to the fact that Whitlach plainly saw and Beck plainly saw his effort to restrain Mr. Turner from hitting him, with the club?

A. No sir.

Q. Do you recall his asking you to tell those guards to testify freely without restraint?

A. He never told me that.

Q. He never told you that?

A. No sir.

Q. I will ask you if in this conversation he recounted of his sick condition and the superior strength of Mr. Turner?

A. I don't remember those conversations but he may have men-

tioned his being sick, and that he had been sick, when he was discussing his record and the killing.

Q. And in telling about that, didn't you say at the former trial that he, meaning Robert, didn't have a very robust appearance at the time of the killing?

A. I may have—he didn't have.

Q. And in these conversations in which he refused to go into these details, didn't he call your attention to his own lack of health and strength, at the time, and Mr. Turner's superior strength?

A. No, I don't remember that he ever made any comparison, of that kind. My best recollection was that he did say that he hadn't done anything, had not been of any use to the prison and that he claimed that he had been sick.

Q. You knew that he was long under the treatment of the doctor for Bright's disease?

A. I didn't learn that until after the killing, it was brought out.

Q. That is, the doctor didn't advise you what the trouble with him was?

A. He didn't advise me anything about his being at the hospital until after the trouble was brought out; but I knew in a general way, and I could not tell from whom, that this prisoner was over at the hospital frequently and was sent to quarters and didn't work.

(Witness excused.)

462 STEPHEN QUINCY ALEXANDER, called as a witness on the part of the government, being duly sworn, testified as follows:

Direct examination.

By Mr. Robertson:

Q. State your name, please?

A. Stephen Quincy Alexander.

Q. Mr. Alexander, where do you reside?

A. My home is at Leavenworth; at present I am on my farm working.

Q. You have a farm in this county?

A. Yes sir, ten miles out.

Q. Were you at one time a United States officer at the Federal penitentiary here?

A. Yes sir.

Q. How long were you an official at the prison?

A. Going on fifteen years. I went there the first of November, 1903, and resigned the middle of this last March, 1918. I worked for the government going on fifteen years.

Q. What official position were you holding at the prison in the month, during the month of March, 1916?

A. 1916?

Q. Yes, two years ago last spring?

A. Well, I forget now, just exactly what detail I was on.

Q. You remember the occasion of Andrew F. Turner being killed there, guard Turner?
A. Yes sir.
Q. And were you a guard at that time?
A. Yes sir.
Q. And where did your duties take you in the prison at that time?
A. The Sunday that Mr. Turner was killed, was my Sunday off; I was at home, I believe, as near as I recollect—I was off duty that day.
Q. Were you on duty next day?
A. Yes sir.
Q. Do you know the defendant, Stroud?
A. Yes sir.
Q. Where were you on duty the next day after the killing, then?
A. That is a question——
Q. Were you in the isolation ward?
A. No, I don't think I was; I went in the isolation ward, as near as I recollect, the first of February, 1917, I think. But we
463 were shifted around some, I can't recall just where I was the next day. I might have had a regular detail when I went on duty and I might have been changed, you know.
Q. Well, were you for a time after guard Turner was killed, were you serving in the isolation ward?
A. Yes sir, about one year, I took care of Mr. Stroud.
Q. Took care of him?
A. I was his keeper for almost one year, yes sir.
Q. Did you there in that ward, while you were there, converse with him about his having killed guard Turner?
A. Yes sir.
Q. Who was present, that could have heard the conversation you had with him?
A. Why, Tyson, a prison orderly at that time was in there with me, a prisoner.
Q. A negro prisoner?
A. Sir?
Q. A negro prisoner?
A. Yes sir.
Q. He was a trusty, the orderly?
A. The orderly in the isolation building—yes sir.
Q. I wish you would relate to the jury your conversation as well as you can, with defendant Stroud, about guard Turner?
A. Well, I spoke to Stroud one afternoon——

Mr. O'Donnell: Just a moment—may I ask the witness a few questions?
The Court: Yes.

Questions by Mr. O'Donnell:

Q. You say you were the guard in charge of Mr. Stroud in the isolation ward?
A. Yes sir.

Q. And you had authority over all of the prisoners in that ward?
A. In the isolation ward, yes sir.
Q. Yes sir—between what dates?
A. What dates—as near as I can tell you I was in there almost a year, from the first of February, as near as I can tell you, 1917, until I was changed to the power house according to the prison de-
464 tail, along, I think about the first of February, 1918, or 1917 the latter part—about the first of the year—it might have been a little over a year, as near as I can tell you.
Q. The conversation that you mentioned was held where?
A. In the isolation.
Q. In Stroud's cell?
A. No sir, in the isolation ward, in the hall way.
Q. And you were at the time the only guard on duty, were you?
A. Yes sir, they only keep one guard in there.
Q. And you had spoken to him about this matter before you entered into this conversation?
A. How is that?
Q. You spoke to him about the killing of Turner before you had the conversation with him—did you commence the conversation?
A. Yes sir, I asked him why he killed—I will tell you truthfully—why he had the heart to kill this man Turner, when——
Q. You asked him that question?
A. I did.
Q. And it was your purpose, Mr. Alexander, in asking that question to find out about the matter so you could testify on the part of the government?
A. No sir, I was not in the trial—I was not figuring to be a witness, didn't care to be, to tell you the truth of the matter—didn't care to be a witness.
Q. How soon was it after that you told somebody in authority about this conversation?
A. How soon afterwards?
Q. Yes?
A. Well, I could not tell you that; it was not right away.
Q. Did you tell the prisoner that what he said in response to your question might or might not be used against him?
A. No sir.
Q. You gave him no warning of that kind?
A. No, nothing of the kind.
Q. And you were the guard over him at that time?
A. Yes sir.
Q. Wearing your club?
A. Sir?
465 Q. Then armed with your club?
A. No, I hardly ever carried a club—he will tell you that himself—I don't know as I had it in my hand once while I was in there.
Q. He was in the isolation ward undergoing punishment then?
A. He was in his cell, yes sir, after the trial here.

Q. And you had authority at that time to cause him to suffer more punishment if you saw fit?

A. No sir; I never put the punishment onto the prisoner.

Q. Yes, but you had authority, Mr. Alexander—you had authority?

A. No.

Q. You could report him?

A. I tell you, lawyer, if a prisoner does not obey the rules of the government, and I report it to my superior officer, it is up to him, sir; I want you to understand, I understand the prison rule fairly well, and it is not in my power or any other guard's power, without the deputy warden's order, or the warden's.

Q. Yes, that is what I am asking you—you had authority to report him to the warden?

A. Yes sir, that is my duty as a sworn officer.

Q. And were you accustomed to reporting these conversations to him?

A. I am not hasty—I am a very conservative man. If I thought it was anything detrimental to the institution I would report it, otherwise not.

Mr. O'Donnell: That is all.

(By Mr. Robertson, resuming:)

Q. Were you a witness on either of the other trials of this case?

A. No sir, I was not.

Q. Now, you say you asked him why he find it in his heart to kill guard Turner—what did he say?

Mr. O'Donnell: Defendant objects to the witness answering the question for the reason it appears he was a guard in authority
463 over the defendant, and for him to repeat the conversation is equivalent to compelling the defendant, the prisoner, to testify against himself, in violation of the Fifth amendment to the Constitution of the United States.

The Court: The objection is overruled.

And to this ruling and action of the Court defendant then and there duly excepted and still excepts.

Q. Proceed, Mr. Alexander?

A. In the first place—I will try now to tell you the whole thing—in the first place, in sitting in the isolation ward, where I sat for a whole year, perhaps more than a year, the idea struck me where this man could carry the weapon——

Mr. O'Donnell: That is objected to, and we ask that the jury be instructed to disregard it.

The Court (to the witness:) That may seem the right way to you, but it is not the way the law requires. Now, you just answer the question the way Mr. Robertson asks it.

(To Mr. Robertson:) Ask the question again.

Mr. Robertson: I withdraw it for the present.

Q. Take this garment and look at it? (Shows witness coat.)
A. Yes, that is the coat.
Q. Have you seen that before?
A. Yes sir.
Q. Whereabouts?
A. In the cupboard of the corridor in the isolation ward, where I was guard, and where his clothes was kept. I am the man that found that, where he carried the knife.
Q. Is that his coat?
A. That is his coat.
Q. That was worn by defendant Stroud?
A. Yes sir.
Q. And calling your attention to a number appearing upon it, is that his number?
A. That is his number,—8154.
Q. You know that to be his garment—his coat?
A. Yes sir.

467 Mr. Robertson: I offer this Coat No. 8154 in evidence.
Mr. O'Donnell: We don't understand the purpose of that until he has identified it.
The Court: I don't hear you.
Mr. O'Donnell: This coat is not identified by anybody—that guard said he was not present when Turner was killed.
The Court: I think the testimony shows that each convict was supplied with but one coat of that character?
Mr. O'Donnell: We withdraw our objection.

And thereupon the coat was received in evidence and identified as Exhibit 3.

Q. Now, you say you asked him then why he killed Mr. Turner?
A. Yes sir.
Q. I wish you would go on and tell the conversation that occurred between you—try to keep away from other matters, Mr. Alexander?
A. I am trying to confine myself to your question. I want to be fair with everybody. I asked him why he killed this man, leaving a wife and little children behind him. "Because," he said, "he was a dirty rat."

Miss La Bar: Rat?

A. "A dirty rat."

Mr. O'Donnell: I move to strike out the answer as incompetent, irrel-vant and immaterial, and also for the reason stated in regard to the questions propounded to the witness.
The Court: Overruled.

And to this ruling and action of the Court defendant then and there duly excepted and still excepts.

468 Q. What if anything further do you recall?

A. You want me to tell all that I had with him?
Q. Yes?
A. I will tell you the conversation—excuse me—all that I had with him. I asked him—that is why I am speaking about what brought it about, how it came about——

Mr. O'Donnell: Are you repeating the conversation that you already told us?
A. The same thing you asked me about——

Mr. O'Donnell: We object to the repetition.
The Court: I don't know whether he is or not. If he had any further conversation, he may state it.

A. I said, "How did you know where you would catch this man in the dining room?" He said, "I figured that out in the gallery; I knew my cell and I knew what aisle he would be standing in when I marched out from dinner, and I knew where I would get him"—that is the truth, gentlemen.
Q. Mr. Alexander, did you ever call his attention to this coat?
A. No, I don't think I ever said anything to him about it—no, I don't think I did.
Q. What, if anything, did he say to you about the wife or family of this man?
A. He said he felt sorry for them——

Mr. O'Donnell: That is objected to as leading and suggestive;—he has already asked him what the conversation was—it puts the answer in his mouth.

A. He also said that he would have killed Captain Purcell if he hadn't turned his back, when he told him to stand back, but he would not stab him in the back.
Q. I wish you would tell the jury, if you know, what has been this man's attitude toward the prison officials there, tell the jury what you know about that, while he has been a prisoner since he killed guard Turner and he has been in the isolation ward?

Mr. O'Donnell: That is objected to as calling for the opin-
469 ion of the witness.
The Court: Sustained.

Q. Have you heard, during that period in which he has been in your charge, this defendant express himself about the officials of the prison, those over him?

Mr. O'Donnell: That is objected to as immaterial.
The Court: Sustained.

Q. I wish you would go ahead, Mr. Alexander, and tell the jury anything else that may occur to you that you may have heard in regard to this matter?
A. I don't understand this last question, am I permitted to talk or was the gentleman's objection overruled or sustained?

The Court: Sustained. (To Mr. Robertson:) Put your question to him again. (To the witness:) This is the question:)

Q. Just relate to the jury anything else that you remember that the defendant stated to you there in connection with this matter?

The Court: What do you mean by "this matter"?
Mr. Robertson: I mean in relation to the officials of the prison, and those in authority over him.
The Court: I sustained the objection.

Q. Do you now recall anything more in the conversation that occurred there between you and him?
A. Yes sir, I had a great many conversations——
Q. Between you and Mr. Stroud?

The Court: About what?
Mr. Robertson: Turner's death.

Q. Go ahead and relate them?
A. No, I think that is about all particularly in regard to the death of guard Turner.

Mr. Robertson: You may cross-examine.

470 Cross-examination.

By Mr. Kimbrell:

Q. How long have you been an officer of the prison?
A. How long was I a prison guard?
Q. Yes?
A. Going on fifteen years.
Q. And how old were you when you entered the service?
A. I am, will be sixty years old the 16th of this coming October.
Q. So that you began as a guard——
A. The first of October, 1903.
Q. Had you been a policeman before that?
A. Yes sir—I was, not a policeman, a constable.
Q. How long were you a policeman?
A. About four or five years, I guess.
Q. Where were you a constable?
A. In Quenemo, Osage County, and Gas City, east of Iola, a short time.
Q. Have you served as sheriff?
A. I was deputy sheriff of Osage county, under Sheriff Hoffman.
Q. Have you served as constable and deputy constable?
A. As constable, yes sir.
Q. How long did you serve as constable?
A. About two years.
Q. Most of your life you have been officiating as guard or policeman or constable,—something of that kind?
A. Well, I have worked at most everything that was honorable to make a living, farming, carpenter work, working on the section.

Q. Well, of course you were not working at that kind of work while you were occupying these official positions?

A. No sir.

Q. Most of your life has been spent as an official?

A. Perhaps twenty-two years with my prison work, or a little over.

Q. Now, in that twenty-two years, you have had occasion to testify for the government a great many times?

A. Not a great many times.

Q. How many?

A. Well——

Q. How many times do you think you have testified?

471 A. Well, four or five times.

Q. You have found it necessary, to some extent, to train your memory to recall *to recall* the conversations with men accused of crime?

A. No sir, I will tell you, be very frank about it—was very careful and didn't bother about that, and tried to tell the truth.

Q. You know every witness protests that?

A. I try to tell the absolute truth.

Q. Every witness protests that. Now, getting back to the times you have had occasion to relate and particularly to state in court the many conversations of men—you have had to call to memory, to your mind a great many conversations had with defendants against whom you proposed to testify?

A. Not so many; I have not testified more than three or four times, to my recollection.

Q. Now, did you make any memorandum or writing of this conversation with Robert Stroud after you had it?

A. I did not.

Q. How long has it been since you had it?

A. Had what?

Q. This conversation?

A. It has been near about—it was—let me see—February—along in the early fall some time.

Q. Now, as quick as you heard it, did you tell somebody about it?

A. No.

Q. Kept it to yourself?

A. Yes.

Q. How long did you keep it in your own breast?

A. I could not tell you that; I didn't make any note of it, I tell you.

Q. How long was it before you disclosed to anybody this conversation you had with Stroud about killing Turner?

A. Well, as near as I can recollect, the only conversation I had about it was with the warden—the deputy.

Q. How long was it after you had the conversation with Stroud before you told the warden?

472 A. Well, perhaps two or three weeks, perhaps longer—maybe a month.

Q. Did you have this conversation with him before the last trial of this case?

A. I could not tell you that, whether I did or not—I think it was after that.

Q. What was the date that you told the warden about that?

A. I could not tell you that; I didn't set it down—I didn't set it down.

Q. At the time you told the warden, he had been tried twice?

A. To the best of my recollection.

Q. Had you had this conversation with Stroud before either one of those two trials?

A. No, it was after the last of the two trials I think.

Q. Did you see the warden the next day after you had this conversation with Stroud?

A. No sir—sometimes it is almost impossible to see the warden—no I didn't.

Q. Did you report it to your superior officer the first opportunity you had?

A. No, I don't think I did.

Q. Why didn't you?

A. I could not tell you that; I think it was after the second trial—I will tell you the real fact why I didn't as near as I recollect—I can't just be positive about that, but I think that the trial was over and he had "life" and there was no necessity really of rushing in with this evidence when it was all settled, as near as I can recollect, and I didn't go right away.

Q. Then, when you had the conversation with Stroud, then, you regarded all litigation as having ended?

A. Well, I don't know, I supposed it had.

Q. You supposed it had, so that you didn't specially charge your memory with it; you didn't specially charge your memory with it—that is true is it?

A. Well, I could not say as to that. There are so many of these things that transpire in a day's time, taking care of those kind of men, that it is hard to recollect.

473 Q. I think that is true, and you are not sure that you recollect this accurately?

A. How is that?

Q. You are not sure that you recollect this accurately?

A. Yes sir, I do.

Q. This one, you do?

A. Because I asked him why he did it.

Q. It was because you had a purpose in it?

A. No, I can't say that I did—I am fair about that.

Q. You asked the man with the intention of getting evidence against him?

A. No, I didn't—I thought, I will ask the man myself—he will tell you the same thing I do——

Q. What were you doing at the time you had this conversation with him?

A. Sometimes I sat down in the cell and talked with him.

Q. I am asking you what you did this time?

A. I stood there by the cell and talked to him.

Q. How long had you been talking to him before you asked him this question?

A. Sometimes I would talk with him half an hour, off and on.

Q. I am not asking you about the other times—I am asking you about this time—how long you had been talking when you let up to get at it to get this admission from him?

A. I could not tell you how long I had been talking to him.

Q. Do you know what time of day it was?

A. I could not tell you—it was along in the afternoon—I think it was—or evening.

Q. You are sure of that?

A. I think it was—pretty sure—in the afternoon. In the morning we had lots of work, cleaning up—our leisure time is in the afternoon.

Q. Was anybody else present when you had the conversation?

A. I think Tyson, the orderly, was present when I had the conversation.

Q. What is the orderly's first name, Marshall Tyson?

474 A. Yes Marshall Tyson.

Q. Did you call out for him, that he might hear the conversation?

A. No, he was in the hall way, there.

Q. What was he doing?

A. He mopped out the hall way there, attended to my wants, to bring me something that they wanted, or were permitted to have, or anything of that kind.

Q. Was that the first question you popped at Robert that morning?

A. The first question?

Q. Did you come there and get in conversation and ask him this question directly or did it come in, in the course of many things said?

A. No, it was not the first question; we were talking about different things, and, as near as I can tell you truthfully, we might have talked about ten or fifteen minutes.

Q. Talked ten or fifteen minutes about something else?

A. Yes sir.

Q. What was it you talked about that ten or fifteen minutes?

A. We talked about his trial perhaps——

Q. Wait a minute, officer, I am not concerned about general things—I want to know, in this ten minutes what you said and what he said?

A. We talked about his trial—perhaps——

The Court: Mr. Witness, that does not answer the question, "perhaps." Counsel has asked you what you said before you asked him this question. What did you say before you asked him this question? If you remember, now, tell—if you don't, say so.

A. I don't—I don't recollect.

Q. Do you recollect how long you continued the conversation over this statement of his?

A. No, I don't recollect that.

Q. Are you sure whether you stayed there and talked to him an hour over that?

A. No, I didn't talk that long.

Q. — long did you talk?

475 A. We talked, perhaps, ten or fifteen minutes.

Q. The court has just told you not to be "perhaps"ing?

A. Well, I didn't look at my watch.

Q. Do you recollect that you continued the conversation at all, after you got this admission?

A. Well, I could not do that—I might have been called away, you see.

Q. You don't remember anything before that for certain, or after for certain—that is true, is it?

A. Well, perhaps—yes, I guess that is true—just wait, I might explain—you see I am the officer in charge of the isolation ward and from ten to fifteen men; one of the prisoners might be knocking on the door and you might have to go, and there are other things, or a guard might have called you, and it is hard to recollect these things —that is why I don't recollect.

The Court: If you don't remember, say so. There is no law to compel you to explain why, if you don't recollect; but if you remember the conversation, tell us what it was—if you don't remember it, say so.

Q. Did anybody interrupt you during this conversation?

A. No sir.

Q. It was not broken into at all?

A. No sir.

Q. Did Tyson break into the conversation with any remarks?

A. No sir.

Q. How long was it after this conversation until you reminded Mr. Tyson, if you did at all, what Bob had said to you?

A. I didn't say anything to Tyson about it.

Q. But you knew he heard it?

A. I told you a bit ago that I thought he heard it—he was standing not far away.

Q. Why didn't you talk it over with Tyson, that Bob had made an important admission to you and see if Tyson had heard it—why didn't you ask Tyson what he had heard, if he heard anything——

A. You ask me why I didn't?

476 Q. Yes?

A. As a rule, I didn't talk to the prisoners.

By the Court: You didn't talk to the prisoners?

A. No—as a rule.

Q. Then you had no reason?

A. Didn't have any reason.

Q. Did you ever talk this over with Tyson, whether he heard it?

A. No.

Q. When, three weeks later, you reported the conversation to the warden, did you tell the warden that Tyson had been present?
A. Well, I don't recollect whether I did or not.

The Court: Now, you have answered that completely; if you don't remember, say so; if you do, tell it.
Mr. Kimbrell That is all.

Redirect examination.

By Mr. Robertson:

Q. Counsel has asked you if you had been a witness for the government before——

The Court: Not for the government?
Mr. Robertson: That is what I understood.
The Court: I think he asked him if he had been a witness for the prosecution.
Mr. Robertson: As I understood, he being a peace officer, he asked him whether or not he had been used as a witness in other cases, and he said he thought he had three or four times. * * * It probably don't amount to sufficient to take the time—that is all.

Recross-examination.

By Mr. Kimbrell:

Q. What means have you of fixing the date of this conversation with Robert Stroud in your memory?
A. What means have I?
Q. Yes?
A. Well, I will be very specific about it: When I told the warden about it—I thought it was my duty to tell the warden what he had said—as a prison official—and——
477 Q. Now, fix the date?
A. I cannot do that; I cannot tell you exactly what day it was, after the last two trials,
Q. Was it 1916, or 1917 or 1918?
A. It was after—all I can say, it was after the last two trials—that is all I can say.
Q. You said awhile ago it was last fall, didn't you?
A. As near as I can recollect, yes; something I can't tell you definitely.
Q. Was it directly before Christmas of last year?
A. I think it was along in the fall, as near as I can recollect—I would not be positive as to the time.
Q. Well, was it before Christmas of last year?
A. I could not tell you that.
Q. Was it before Christmas of the year before?
A. I said, I am not positive.
Q. Are you sure it was not before the last two Christmases back?

A. The trial didn't run that far back, the second trial, I don't think.

Q. You don't remember except by estimating from the second trial, whether it was two years ago or not, do you?

A. I was not a witness—I don't remember.

Q. What makes you think it was in the fall and not in the summer?

A. By my detail and when I went out of there.

Q. Perhaps we can get at it—when did you go out?

A. I told you one time how we can get it—go out and get the prison detail——

Q. Don't you know when you quit there?

A. No, not when I went out, the exact date—no sir.

Q. I believe you said you went in there February 1st, 1917?

A. As near as I can recollect.

Q. And it was after you went in there, February 1st, 1917, that you had this conversation?

A. February 1st, 1917, I think, the detail placed me in there, and as near as I can recollect it was February 1st, 1918, that the detail took me out of there—was there most a year.

478 Q. Now, wait a minute—are you sure it was after this first of February, 1917, that that conversation occurred?

A. Yes sir.

Q. You are sure of that?

A. Yes sir; because I went in there February first, 1917.

The Court: You need not give any reason.

Q. You are sure it was in the spring, after February or the summer following that February or it was in the fall following that February, that this conversation took place?

A. It was during that year—yes.

Q. And are you as sure that Tyson was present as you are that the conversation occurred there?

A. Yes, Tyson was there almost all the time.

Q. Are you as sure of the presence of Tyson as you are of the conversation?

A. Yes, he was standing ten or fifteen feet away.

Q. You noticed him closely?

A. Yes sir.

Q. You wanted him to hear, and wanted to know that he did hear?

A. No, I didn't care whether he heard it or not.

Mr. Kimbrell: That is all.

(Witness Excused.)

MARSHALL TYSON, called as a witness on the part of the government, being duly sworn testified as follows:

Direct examination.

By Mr. Robertson:

Q. What is your name?
A. Marshall Tyson.
Q. And were you a convict in the prison, beginning, we will say, with the month of March, 1916?
A. Yes sir.
Q. And do you remember the occasion of guard Turner being killed there by the defendant?
A. Yes sir.
Q. You didn't see it, did you?
A. Yes sir.
Q. Were you in the dining room?
A. I just came in the dining room—I seen part of it.
479 Q. What part did you see?
A. I seen him in the aisle and when he fell, and I hurried on out of the dining room.
Q. Were you an orderly in the isolation ward at that time?
A. Yes sir.
Q. And for some time after that?
A. Yes sir.
Q. Do you know guard R. G. Brown?
A. Yes sir.
Q. And was he a guard there at that time?
A. Yes sir.
Q. Was there a guard there sometime later, in the isolation ward, by the name of Alexander?
A. Yes.
Q. You know him?
A. Yes sir.
Q. I will ask you whether you heard some statements made by the defendant Stroud in that isolation ward, regarding the killing of Mr. Turner?
A. Yes sir.
Q. Statements that were made by the defendant Stroud?
A. Yes sir.
Q. How long after the death of Mr. Turner was that?
A. Well, I guess it was only about two or three days or a little more.
Q. Did these happen in the day time or in the night?
A. It was in the night—in the evening late, rather.
Q. Who was there at the isolation ward, besides you?
A. You mean prisoners and officials?
Q. No, officials?
A. I think the official was Mr. Brown.
Q. Guard Brown?

A. Yes sir.

Q. Who was the defendant Stroud talking to?

A. Why, he was talking to a prisoner by the name of Lewis—by the name of Jones. His name was Jones—I don't know his other name.

Q. Was there a prisoner there at the time in the isolation ward of the name of Lewis?

A. Yes.

Q. There was—just tell the jury in your own way what you heard the defendant Stroud say about that?

A. He said he intended on the Saturday to kill Mr. Tur-
480 ner on the Sunday, and that he knew where he would be standing by the gallery that he had in the cell house, and he said when Turner came down the aisle, he asked him if he, did he report him, and Turner said "no," and he looked him square in the eye, and that when Turner dropped his eyes he gave it to him two inches and a half from the center, and that Turner looked sick and raised his club as he started to fall, and he would have given him another but that just then Captain Purcell stepped down the aisle and saw the knife and stepped back, and that it was good for him that he did, because he didn't like him anyway.

Q. Was Stroud talking to Jones during all this conversation?

A. Yes.

Q. And Jones talking to him?

A. Jones was mostly listening.

Q. Yes?

A. And pretty soon a fellow by the name—I don't remember his name, his number was 8373 or 7383—something like that—he hollered to Stroud and told him that there was an ear out——

Q. An ear out?

A. Yes sir, and that ended the conversation; Stroud said, "Turner died with heart disease."

Q. Stroud made that remark also?

A. Yes sir.

Q. Where was you and Brown with reference to these men that were talking?

A. I guess I was about six or eight feet from him—not more than that.

The Court: Talk plain.

A. About six or eight feet, not more than that.

Q. From where?

A. From where this talking was going on.

Q. Were you where these men that were talking could see you?

A. No sir, they could not see me.

Q. Was Mr. Brown there also?

A. Yes sir.

Q. Was he where the man that was talking could see him?

A. He was at his desk; they were on the same side; I don't
481 think they could.

—. These prisoners do a good deal of talking there at times, among themselves?

A. Yes.

Q. What were you there for, at that time?

A. Well, robbery.

Q. Have you served some other terms in prison?

A. Yes sir.

Mr. Robertson: You may inquire.

Cross-examination.

By Mr. Kimbrell:

Q. I believe you don't remember how many times you have been convicted?

A. Quite a few.

Q. Now, at the last trial of this case, was not this question asked you, and didn't you make this answer: "What were you sent for? Answer: Trying to be crooked—trying to do crooked work? Question: What kind was it? Answer: Just a little of everything. Question: Kind of an expert crook, is that the idea? Answer: I tried to be. Question: Well, tell me this; how many times have you been convicted? Answer: Well, I could not tell you that"—didn't you answer that way before, that you did not know how many times you had been convicted?

A. I told you three.

Q. Didn't you answer that way before, that you could not tell how many times you had been?

A. No sir, I did not.

Q. You are a Washington, D. C., man?

A. Yes sir.

Q. Was most of your crooked work done in Washington, D. C.?

A. Yes sir.

Q. Where else?

A. Just Washington, D. C., that is all.

Q. Were you pardoned just before you testified before—do you remember that?

A. Yes sir.

Q. You remember that after you testified, or after you got notice of these papers, you said you studied a good deal about what you were going to say, do you remember that?

A. After I got notice of which papers?

Q. After you got the papers for the second trial you said you studied a good deal over what you were going to say?

A. I knew what I was going to say very well. I think you
482 asked me to look at this statement before I came into court and I told you I had once.

Q. That is before coming into court you read over your statement?

A. No, I never read it over—I never read it over.

Q. What was it you read?
A. The statement I made on the last trial.
Q. Now when you heard the statement of Robert Stroud and Jones did you write it down?
A. No sir.
Q. You just stored it away in your memory?
A. Yes sir.
Q. And when did you first tell anybody about it when you heard it?
A. Why I told it to Mr. Robertson when he come to see me about it.
Q. How long was that after you heard it before you told Mr. Robertson?
A. Oh, not so very long, two or three days before he came, I presume—I suppose.
Q. And you heard this conversation the night after the trouble between Stroud and Turner?
A. Probably a night, or two or three nights.
Q. Now you testified in the trial against Jones—(part of question and answer not clearly heard).
Q. Didn't you testify to this conversation then, to this conversation between Jones and Stroud?
A. Did I testify where?
Q. Did you testify when Jones was tried here in this court room?
A. Oh, yes; I testified against Jones, yes sir.
483 Q. What is the matter with your memory—have you a bad memory?
A. No sir.
Q. That had slipped you, hadn't it?
A. A little bit—yes sir.
Q. Do you remember what you said, when you testified against Jones?
A. Not all of it.
Q. Now, don't you remember that you testified that it was Jones who said that he got his man and that he got him the first chance, and didn't have to hit him the second time?
A. No sir, I never said Jones.
Q. Now, do you recollect what you testified about in the Jones trial?
A. At the Jones trial?
Q. Yes, the Jones trial—do you recollect now that you did testify in that, since you think about it?
A. I don't think I testified against Jones at all, if I am not mistaken. I don't remember whether I did or not. I don't remember.
Q. You said a moment ago that you did?
A. Probably I might be mistaken.
Q. You heard but the one conversation between Jones and Stroud, and that is the one you have related?
A. I have testified against Stroud, but I never heard Jones say anything.
Q. Jones was at the other end of this conversation?
A. Yes, but Jones was listening—he didn't say anything.

Q. Isn't he the one that said, "There is an ear out" when he got a sign from the man in front of him?

A. No sir, this man across from these two fellows that was talking, he is the one that said, "There is an ear out." I never heard Jones say anything.

Q. Now, wasn't it Jones that said to Stroud, "there is an ear out?"

A. No sir.

Q. Now, in the last trial of this case, wasn't it, you remember, that you got your pardon papers?

A. Yes sir.

Q. You remember examining them?

A. Yes sir.

484 Q. You made sure they were all right, didn't you?

A. Yes.

Q. And then you proceeded to testify, didn't you?

A. Yes sir.

Q. I will ask you if at that time these questions were not asked you and you didn't make these answers: "Mr. Robertson: Just take your time now. Answer: He told Jones that he looked him square in the eye, and when Turner dropped his eyes, he gave it to him two inches and a half from the center, and he knew he had him. He told Jones that Turner looked sick, he raised his club as he started to fall, and he started to give him another, when just then Captain Purcell hurried down to grab him, and saw the bloody knife, and stepped back, and he said it was good for him that he did, because he didn't like him anyway. Question: He said it was what? Answer: It was good for Captain Purcell that he did. Question: That he did step back? Answer: Because he didn't like him anyway. A fellow across from him—I don't know his name but his number was 8737, we called him Red, he heard a noise and he seen the guard, and he made signs to Jones in the deaf and dumb language on his fingers, that the gaurd was near. He made signs to Jones and Jones said to Stroud that there was an ear out and that ended the conversation." Do you remember, now, stating that?

A. Well, I said a while ago it was one of them—I said I didn't remember just which one.

Q. Don't you remember saying a while ago, that Jones did no talking?

A. I said I never heard Jones doing any talking during that conversation, I thought—I know now that he said them words.

Q. You think he said those words?

A. I know now that he did.

Q. How did this conversation between Jones and Bob Stroud begin that night?

A. I don't remember how it did begin then they started

485 talking.

Q. What time of night was it?

A. About seven o'clock, or about that time.

Q. How far apart were they?

A. There were just two cells between them.

Q. Were the cells between them occupied?

A. I don't think they were.
Q. Was there anybody in the cells across the hall from them?
A. There was one fellow that I know of.
Q. This was in the isolation ward, wasn't it?
A. Yes sir.
Q. How many cells are there in that ward?
A. I think there are 22.
Q. How many of them were full that night?
A. I think there were three or four right in that——
Q. Who was there in there besides Jones and Red and Robert Stroud?
A. There was Jones and Robert Stroud and this fellow I am speaking of they called "Red"—that is three, and I think Lewis was in there—I am not sure.
Q. Anybody else?
A. That is all I remember.
Q. Where was Lewis' cell?
A. I think he was away up in the corner cell, across from Stroud's—not exactly opposite but further up in the corner.
Q. Who was between these two cells, between Stroud's cell and Jones' cell?
A. I think between that there was nobody.
Q. Nobody in those cells—how far was it from Robert's cell down to Jones' cell?
A. I think it was probably twelve feet.
Q. Those rooms are back rooms with the door opening out into the hall?
A. No, the door opens on the inside—it opens on the outside but it opens into the cell.
Q. There is a door opening from these back rooms that they call isolation, out into a hall?
A. Yes sir.
486 Q. How big is that hall?
A. I don't know—I will give you an idea as near as I can: the hall is about as wide as from me to that desk—perhaps a little wider, and as long as this room—it must be quite as wide as that is here and it is longer—twice as wide, I think.
Q. And these cells are on each side of the building, with the hall way in the center—that is true, isn't it?
A. Yes sir.
Q. And it is closed by a door from the Warden's office—that is the entrance into this hall of the isolation ward—is that the way it is there?
A. Yes sir.
Q. And when you close those doors, the men that you have in the inside there are all within the four walls, no windows except those ventilation windows?
A. There is only the iron doors and you can see through the bars at either end of the door.
Q. And one person speaking anywhere in that hall, can be heard

anywhere in that hall, can't he, from one end of that hall to the other end?

A. I guess if they were talking as loud as you are, I guess they could.

Q. I am glad I am speaking distinctly so you can understand. These men were speaking loud enough so that they could be heard across these two rooms?

A. Yes sir.

Q. They were just about as far as you and I are?

A. Yes sir.

Q. And they could be heard anywhere in the room?

A. I would not say anywhere in the room——

Q. They didn't speak in an undertone, or attempt to?

A. I would not say in an undertone.

Q. How long had they been speaking?

A. Ten or fifteen minutes.

Q. What else did you hear them say?

A. That is about all I heard them say; when they started off talking, they started off on this subject.

487 Q. And did they talk about it ten or fifteen minutes?

A. About that time, I think.

Q. And have you told all that they said?

A. All that I can remember—there may have been a few words that I have not said, but it was about all there.

Q. Now, tell us again what it was they said—begin at the beginning and tell us what it was?

A. I heard Stroud tell Jones that he intended on the Saturday to kill Turner on Sunday, that he knew where he would be standing by the gallery he had in the cell house; he said when Turner came down the aisle he asked him if he did report him and Turner said "no;" he said he looked him square in the eye, and when Turner dropped his eyes he said he gave it to him two and a half inches from the center and he knew he had him; that he would have given him another, but that just then Captain Purcell came down the aisle and saw the knife, the bloody knife and stepped back, and that it was good for him that he did because he didn't like him anyway.

Q. That is word for word the way you told it before, isn't it?

A. I think it is, yes.

Q. You memorized that, didn't you?

A. I remember it, yes sir.

Q. And you have told it just in the same words—you left out the word "bloody"—you said that he saw the knife, and corrected yourself to say he saw the bloody knife and stepped back, didn't you?

A. I didn't think it was necessary to put "bloody knife" in there—yes sir—he saw it was a knife.

Q. Now, that is the way you have memorized that story and told it just the same every time?

A. There was no other way to tell it, because it is the truth.

Q. You spent a great deal of time memorizing it?

A. I remember it very well.

Q. You wrote it out before you came here and you studied over it a good deal before you got it right?

A. Not much—I didn't have to study it.

488 Q. You got it perfectly, sir?

A. I know it pretty well.

Q. How long did you study it?

A. I said I didn't have to study it.

Q. Now, I will ask you if these questions were not asked you and if you didn't tell it this way at the first trial: "Question: Now, tell the jury how that came about, and what you heard the defendant say?"—and if you didn't answer: "I heard Stroud tell Jones that he intended on Saturday to kill guard Turner on Sunday, that he knew where he would be standing by the gallery he had in the cell house; he said when Turner came down the aisle, he got up and asked Turner did he report him; Turner said "No;" that he looked him square in the eye, when Turner dropped his eyes, he gave it to him two and a half inches from the center, and he knew he had him. Turner looked sick, and raised his club as he started to fall, and he started to give him another, when just then Captain Purcell hurried down to grab him, and saw the bloody knife and stepped back, and it was a good thing he did, because he would have killed him, because he didn't like him anyway"—now is that right?

A. You put that "grab" in there—I never said he grabbed him at all.

Q. Did you say then, that he said that Turner died of heart disease?

A. Yes, I told you that at the first trial.

Q. Now, at the second trial, I will asi you if I didn't ask you this question: "Now, you studied over tho-e wo-ds so that you could say the very same thing?" and if you didn't answer, "Yes, we did."

A. Did I study over it?

Q. I asked you if that question was asked you and if you gave that answer?

A. Did me and Mr. Brown study over those words?

Q. I will begin back and go over it again: "Question: That

489 is exactly as you worded it before isn't it? Ans. I think it is. Question: And exactly as you testified before, isn't it? Answer: I think it is. Question: That is the story as you fixed it up when you knew you would be subpoenaed? Answer: Yes sir, it is. Question: And you studied over those words so that you could say the very same thing? Answer: Yes, we did."—

A. No sir, whoever wrote that just wrote it wrong; I never said I studied over that when I knew I was going to be subpoenaed.

Q. Do you recognize this lady here?

A. Yes sir.

Q. I will ask you if, continuing, you said, "And you studied over those words so that you could say the very same thing? Answer: Yes, we did. Question: You have got this down and memorized

it, so that you could say the same thing every time? Answer: So that I can tell it like I told it before. Question: Weren't you doing it to get that paper you have got in your pocket? Answer: I was expecting to get it long before I ever testified here against him."—Now, were those questions asked you and those answers given about memorizing a writing?

A. No, I never told you I was expecting no pardon—I didn't know anything about it.

Q. Did you testify that way, Marshall?

A. I did not. I didn't tell you I was expecting any pardon.

Q. Do you remember this lady here? Do you remember her reporting your second testimony—at the second trial?

A. I remember her reporting the second trial——

Mr. Robertson: If your honor please, Miss La Bar never wrote out this testimony at the second trial.

Q. Do you remember seeing this gentleman here, at the second trial?

A. No sir; I don't remember seeing this gentleman before.

Q. You claim that this bill of exceptions o. k.-ed by the District Attorney and filed in the Supreme Court of the United States
490 is wrong—not a correct report of your testimony at all—that is what you tell us?

A. Well, there is things there that I didn't say, that you read there, anyway.

Q. If Mr. Robertson O. K.-ed it, it is wrong?

A. I can tell you just exactly what I said before.

Q. You have got it down pat, haven't you, Marshall?

A. Yes sir.

Mr. Kimbrell: That is all.

Redirect examination.

By Mr. Robertson:

Q. Just one or two questions—I will ask you, Mr. Tyson, whether when you testified at the first trial, if you were not yourself an inmate of the prison?

A. Yes sir.

Q. Were you at that time?

A. Yes sir.

Q. And is it not a fact that when you were subpœnaed to come to the second trial, you were living in Chicago?

A. Yes sir.

Q. And had received a parole?

A. Yes sir.

Q. And were out on parole?

A. Yes sir.

Q. That was out practically before you got the pardon?

A. Yes sir, nearly a year.

Q. You didn't get your pardon until you came here for the second trial?
A. Yes sir.

Recross-examination.

By Mr. Kimbrell:

Q. What date was it when you left the prison?
A. I think it was in December.
Q. What year?
A. 1916, I think.
Q. You are sure about that, ar-n't you?
A. Yes, I believe it was.
Q. You were not there in February, 1917?
A. Let me see—1917?
Q. That is just last year—1917—of course if you left in December, 1916, if you are right about it, you were not there the following Spring?
A. No sir.
Q. You were not back at the prison doing any work for the prison, in the fall of 1917?
A. Back doing any work after I came away—no sir.
491 Q. Do you know Mr. Alexander?
A. Yes sir.
Q. You know him?
A. Yes sir.
Q. And did you serve in the isolation ward with him, in the fall of 1917, or sometime after February, 1917?
A. I think I served with him in 1916—I was out of there in 1917.
Q. Are you certain you were with him in 1916?
A. Yes sir, in 1916—I got out, I know, about the last of 1916.
Q. Did you get out right after you served with Mr. Alexander?
A. I think Mr. Alexander was over in the isolation and had charge of it along about six or seven months.
Q. In the spring of 1916?
A. I think it was in 1916. Anyway I got out in 1916. Mr. Alexander was at the prison before I got out and he had the isolation before I got out, in 1916—yes sir.
Q. Now, it was March, 1916, that this killing of Mr. Turner occurred—you remember Mr. Alexander was not in the isolation with you then, don't you?
A. Was thin March, 1916, this killing occurred?
Q. Yes?
A. Well, they were changing the guards—he was in there just before I got out of there—I think it was 1916.
Q. How long was he there before you got out?
A. He was there pretty near six months or more, in the isolation—had charge of it.
Q. You are sure you are right about that?
A. Oh, yes, he had the isolation before I got out of there.

Q. Did you hear a conversation between Alexander and Stroud?
A. Oh, I heard lots of conversation between him and Stroud. I never kept them in my mind. I heard them talking and some things he said.
Q. Do you remember Alexander being down at his cell and asking him about killing Turner?
A. I don't remember anything about that.
492 Q. Do you remember Bob telling him the reason he did it?
A. I don't remember whether he did or not.
Q. You don't remember anything of that at all, that you recall?
A. Not that I recall—no sir.

(Witness excused.)

The Court here took a recess until two o'clock p. m.

And thereafter, at two o'clock p. m. of the same day the Court resumed its sitting, and the following proceedings were had.

Mr. Robertson: I desire to recall Mr. Alexander.

STEPHEN Q. ALEXANDER, being recalled as a witness on the part of the government, for further examination, testified as follows:

Direct examination.

By Mr. Robertson:

Q. Mr. Alexander, do you remember the occasion of Marshal Tyson going out of the prison on parole?
A. Yes sir.
Q. I will ask you whether if the time he spent with you there was prior to his going out on parole?
A. Prior to the time?
Q. Yes?
A. Yes sir.
Q. It was?
A. Yes sir.
Q. Now, if you made reference to 1917 in your testimony, as being the year when you and Tyson were in there together, I will ask you whether or not you were mistaken about that?
A. Yes sir.
Q. What year was it?
A. 1916—May I explain?
Q. I have no objection to your explaining?
A. The moment I got out of this room, it popped into my mind——
Q. Out of the court room?
A. Yes sir—that Tyson went out on parole after the first trial—as near as I can recollect it was eight or nine months, something like that, after the first trial.

493 Mr. Robertson: That is all.
Mr. Kimbrell: That is all.

(Witness excused.)

P. G. BROWN, called as a witness on the part of the government, being duly sworn, testified as follows:

Direct examination,

By Mr. Robertson:

Q. What is your name?
A. R. G. Brown.
Q. Are you a United States officer at the Federal penitentiary near Leavenworth, Mr. Brown?
A. How is that?
Q. Are you an officer at the United States penitentiary?
A. Yes sir.
Q. And how long have you been an officer there?
A. Since 1898—twenty years.
Q. Sir?
A. Twenty years.
Q. What position do you hold?
A. Guard.
Q. Were you guard in the isolation ward, at the time that guard Turner was killed by the defendant?
A. Yes sir.
Q. Were you such guard in that ward for some time afterwards?
A. Yes sir—three or four months, I guess.
Q. Did you have an orderly there by the name of Tyson?
A. Yes sir.
Q. Marshal Tyson?
A. Yes sir.
Q. A black man?
A. Yes sir.
Q. You knew the defendant Stroud, did you —knew who he was?
A. Yes sir.
Q. Do you remember the occasion of his coming in—being brought in there to the isolation ward after that occurence?
A. He was brought in there in the day time—I went on nights.
Q. When you went on, you found him there, did you?
A. Yes sir.
494 Did you, shortly after that occurrence, hear some talk about that?
A. Yes sir.
Q. Were these statements made by the defendant Stroud?
A. Yes sir.
Q. Who was he talking to when you heard him?
A. He was talking to 8690, Jones.
Q. Prisoner Jones?

A. A fellow by the name of Jones—he was in there for killing a convict.

Q. Was Jones across the hall of that ward, or was he in a cell that was alongside—that is on the same side?

A. The hall is around this way—Jones was in Number 3, Stroud was in number 6 cell.

Q. He and Stroud were on the same side of the hall?

A. On the same side—yes sir.

Q. Was there another convict in there by—known as "Red"?

A. 8737-yes sir.

Q. Was he on the same side of the hall as these other fellows?

A. No sir, he was in a cell on the other side of the hall, middleway between the other fellows, the cells facing.

Q. Now, explain to the jury whether Stroud and Jones were situated so that they could see each other when they were talking to each other?

A. No sir.

Q. They could not?

A. No sir.

Q. About when was it that you heard this conversation?

A. Well, this occured on the 26th; I think it was on the 27th or 28th—the first night he didn't have anything to say—he sat by the door.

Q. The first night after the killing?

A. Yes sir, the Sunday night, the 26th, he didn't have anything to say to anybody.

Q. When you heard this conversation, was Tyson there with you?

A. Yes sir.

Q. Tell the jury what Stroud said to Jones about the
495 killing of Turner?

A. Well, it was in the conversation to Jones, he said that he made up his mind on Saturday night to kill Turner on Sunday, that—for reporting him—he said he knew about where he would stand in the dining room from the gallery that he had in the cell house. He said when Turner comes down the aisle, he got up and met him; he looked him square in the eye and asked him had he reported him. He said, "no"; he said, "—when Turner dropped his eyes, I gave it to him two inches and a half from the center, and I knew I had him. When he started to fall, I intended to give it to him again, but Captain John Purcell came down the aisle, and I had a notion of grabbing and killing him, but he looked and saw the knife in my hand with the blood on it, and he stepped back; if he had touched me, I would have killed him."

Q. Can you give the jury an idea how long a time was elapsing during which this was said, between these parties?

A. How long the conversation occupied?

Q. Yes, how long did the conversation continue?

A. Oh, I suppose ten or fifteen minutes.

Q. Yes—did the conversation—I withdraw it—explain to the jury, if you know, how the conversation ceased and what caused it to cease?

A. Well, that fellow, 8737 saw me listening and he told Jones to be

careful, and give him a sign of some kind, and Jones says to Stroud, "There is an ear out", and that stopped it right there.

Mr. Robertson: You may examine.

Cross-examination.

By Mr. O'Donnell:

Q. Mr. Brown, you and Tyson were in this isolation ward, standing together?

A. Yes sir.

Q. That was a room of about what length?

A. Oh, I don't know—I guess that hall is—it ain't quite as long as this room, I don't think—about thirty or thirty five feet between the cells where the conversation was going on.

496 Q. Yes sir—there were cells on either side of the hall?

A. Yes sir, facing each other.

Q. And you say the isolation ward is how many feet in length?

A. Oh, I don't know—I suppose about fifty feet.

Q. Not quite as long as this room?

A. No sir. I don't think it is. It is about, I suppose from the gate, the main entrance where I was standing, down about fifty feet to the back end.

Q. And how far were you from the cell in which Stroud was at the time?

A. Well, I should think it was about thirty-five or forty feet.

Q. From him?

A. Yes, Jones' is Number 3 cell, and I was standing right at Number 4 cell; those cells I suppose are about ten feet wide, Number 2 cell—I mean.

Q. And, Mr. Brown, the isolation ward is just one room partitioned off into cells?

A. How is that?

Q. This ward that you refer to as the isolation ward, is just one room partitioned off into cells?

A. Yes sir, it is a building, that is a hall way and cells on each side.

Q. So that anybody in the room or in that isolation ward at that time and having normal hearing, could hear this conversation between Stroud and Jones, that you have undertaken to describe?

A. Yes sir, everybody could hear it.

Q. How many men were then in the isolation?

A. At that time?

Q. At that time?

A. I don't remember—five or six—it is most generally full.

Q. How many cells are there in that ward?

A. There is about eight or nine cells that were used by prisoners—eight I guess—eight or nine.

Q. Eight or nine cells?

A. In use for prisoners—other cells are used for other things, rubbish room, lumber room.

497 Q. You think that all the cells you used for prisoners were then occupied by prisoners?

A. I think they were all full.

Q. That is, at the time of this alleged conversation, there were men occupying those cells?

A. Yes sir.

Q. And you say they talked out loud there so that everybody in there could hear them, if their hearing was normal?

A. Yes sir.

Q. Do you know the names of any prisoners in any other cell who heard this conversation?

A. No sir—I didn't——

Q. The prison records would show?

A. I presume the house register would show the names of the men, the names or numbers, I think. I knew Jones because he was a noted character, the same as Stroud was, in there for murder.

Q. Mr. Brown, the prison records would show just what prisoners were in that isolation ward at that time?

A. I guess they would.

Q. So that if the government wanted to have some more witnesses to testify to this conversation, it could easily get them?

A. I don't know a thing about that.

Q. Now do you recall seeing Marshal Tyson write out this alleged conversation?

A. No sir, I didn't.

Q. Did you write it out yourself?

A. For myself?

Q. For anybody?

A. Yes sir, and turned it over to Mr. Reno, the deputy warden.

Q. Yes sir; but you wrote out this conversation?

A. Yes sir.

Q. And you carried it over to Mr. Reno?

A. Yes sir.

Q. Did you see Tyson write it out also?

A. No sir, I didn't.

Q. Mr. Brown, I will read you what Mr. Tyson has testified to on the second trial and also on this trial, and ask you if you agree that it is word for word what you wrote out at that time: "I heard

498 Stroud tell Jones that he intended on Saturday to kill Turner on Sunday; that he knew where he would be standing by the gallery that he had in the cell house. He said when Turner came down the aisle he got up and asked Turner did he report him, and he said Turner said, 'No.' He told Jones that he looked his square in the eye, and when Turner dropped his eyes, he gave it to him two inches and a half from the center, and he knew he had him. He told Jones that Turner looked sick; he raised his club as he started to fall and he started to give him another one, when just then Captain Purcell -urried down to grab him and he saw the bloody knife and stepped back, and he said it was good for him that he did, because he didn't like him anyway. A fellow across from him—I don't know his name, but his number was 8737—we called him

'Red,' he heard the noise, and he made signs to Jones in the deaf and dumb language, on his fingers that the guard was near,—he made signs to Jones—and Jones said to Stroud that there was an ear out, and that ended the conversation." Do you say, Mr. Brown, that that is a correct recitation or copy of what you then wrote out and gave to Mr. Reno?

A. A copy of it? I don't know whether it is a copy of it or not—he didn't get it from me.

Q. Is it the substance of it—is not that the language verbatim that you wrote in that report?

A. I don't know whether I have got a right to answer that question or not.

Q. Do you say whether it is or not?

A. He made his statement here; he is on oath the same as I am.

Q. I am asking you if what I have read to you now is what you wrote into that report?

The witness (to the court,: Am I to answer the question?

499 The Court: Yes sir.

Q. Isn't it word for word?

A. About word for word. I left out where he raised his hand—I omitted that. That was in my evidence before; I left it out this time, and you put it in my mind now.

Q. Mr. Brown, you testified twice before in this case?

A. How is that?

Q. You testified twice befo*er* in this case?

A. I think so—yes.

Q. And your testimony on both the former occasions was word for word what it is now?

A. I think so.

Q. Verbatim?

A. Yes sir.

Q. You memorized what you testified to on those three occasions?

A. Sure I did—copied the evidence off in case I needed it again, in case I was called upon to testify.

Q. And how long did it take you to memorize what you testified to—how many days or weeks did you study it so as to memorize it?

A. Me?

Q. Yes? A. I don't know—about five minutes, I suppose.

Q. And you have remembered from the 29th of March, 1916, to now, the words, word for word, as the result of five minutes' study?

A. Oh, no, I *I* guess not;—I have read it over two or three times.

Q. So that you did memorize it like you memorized the Lord's prayer?

A. Sure.

Q. And so did Tyson?

A. I don't know anything about Tyson.

Mr. Kimbrell: That is all.

(Witness Excused.)

MRS. IDA TURNER, called as a witness on the part of the government, being duly sworn testified as follows:

500 Direct examination.

By Mr. Robertson:

Q. What is your name?
A. Mrs. Ida Turner.
Q. Are you the widow of the deceased Andrew F. Turner?
A. I am.
Q. Mrs. Turner, did your husband wear spectacles?
A. He did.
Q. Have you the spectacles with you that he wore the day he was killed?
A. I have.
Q. I wish you would produce them.

(Witness produces spectacles.)

Q. Is there on those spectacles some of his blood?
A. There is.

Mr. Robertson: I offer these spectacles in evidence, your honor.

The spectacles mentioned in the witness's testimony were received in evidence and marked "Exhibit 4."

Mr. Robertson: You may cross examine Mrs. Turner.

Cross-examination.

By Mr. O'Keefe.

Q. Do you know what occulist furnished these glasses?
A. I don't believe that I could say, now. I don't remember; it may be on the case.
Q. Do you know whether it was any of the occulists here in the city?
A. Yes sir, it was.
Q. How long before his death did he purchase these glasses?
A. Well, I could not say; he wore nose glasses before he wore these, and they seemed to be in his way. He said they would drop off, and he had those fixed to go behind his ears. I would not say positively that he bought them in Leavenworth, but he wore them until his death occurred after he changed from nose glasses.
501 Q. Do you know whether he wore these glasses in reading or when he walked the streets?
A. I think he used them most of the time both in reading and in walking the streets—I don't know, but I think he did.
Q. Do you know whether he used them in walking through the aisles up there during meal time?
A. I suppose he did. I don't suppose he took them off then.

Q. You were not present at any time during the meal time at the penitentiary, were you?

A. No sir.

Q. What he did or didn't do there you don't know?

A. No sir.

Q. Do you know whether he purchased those in Atlanta, or not?

A. I am not quite sure whether he purchased them at Atlanta or after he came here.

Q. When did your husband leave Atlanta?

A. It was in the first week of June, 1915.

Q. That would be about six months before his death?

A. About nine months. He was at the prison in Leavenworth 9 months—just about 9 months.

Q. And he had been a prison guard at the United States penitentiary at Atlanta, how long?

A. About fourteen or fifteen months.

Q. About fourteen or fifteen months?

A. Yes sir.

Q. Where was his home originally?

A. You mean where was he born?

Q. Yes.

A. He was born in Arkansas.

Q. And he was appointed guard at Atlanta, you say, about fourteen months before he moved to Leavenworth?

A. He was appointed guard at Atlanta, Georgia, on the 21st day of February, 1914.

Q. And moved to Leavenworth something like nine months before this happened?

A. Something like nine months; it was the first week in
502 June, 1915, when we came to Leavenworth.

Q. Do you know what the occasion for him transferring from the Atlanta Prison to the Leavenworth prison was?

A. His reason was because it was closer to my home. That is the reason that he put in his application immediately after we reached Atlanta, but after he was there about six months, my health failed me on account of the south not being used to that climate, and then he put in a further application in order to get here.

Q. What other positions had he occupied previous to going to Atlanta?

A. He worked for a wholesale grocery company in Des Moines, Ia., and also in Salt Lake City, Utah.

Q. Was he ever in Colorado, working?

A. I don't think so.

Q. The Atlanta work was the first work he had in connection with the Government prisons, was it?

A. I think so—yes sir.

Redirect examination.

By Mr. Robertson:

Q. Where was your home, that you say Mr. Turner transferred to here to be nearer your home?
A. Des Moines, Ia.
Q. That is where your people live?
A. Yes sir.

(Witness excused.)

A. J. RENO, called as a witness on the part of the Government, being duly sworn, testified as follows:

Direct examination.

By Mr. Robertson:

Q. What is your name?
A. A. J. Reno.
Q. Are you an official of the United States penitentiary at Leavenworth?
A. I am.
Q. What official position do you now hold with the prison?
A. With the prison—record clerk.
Q. Do you have another position with the United States?
A. Special Agent of the Department of Justice.
Q. As Special Agent of the Department of Justice is your
503 work all done at the prison, Mr. Reno?
A. Yes sir.
Q. On March 26, 1916, did you hold an official position at the prison?
A. Deputy Warden.
Q. Were you then Deputy Warden?
A. Yes sir.
Q. Did you learn on that day of the occurrence between the defendant Stroud and Andrew F. Turner, a guard there?
A. I did.
Q. Did the club that that guard carried at that time come into your possession?
A. It did.
Q. Have you got it with you?

(Witness unrolls a club from package.)

Q. How did you get it?
A. It was turned over to me right after the occurrence, at the hospital building.
Q. Were you at the hospital?
A. Why, I was there just a few minutes after they carried Mr. Turner in.

Q. Did you see him there?
A. Yes sir.
Q. And the club was there with him?
A. Yes sir.
Q. And the club was there handed to you?
A. Yes sir.

Mr. Robertson: I offer it in evidence.

Questions by Mr. O'Donnell:

Q. Mr. Reno, you were not in the dining room?
A. No sir.
Q. And you didn't actually see Mr. Turner wear this club?
A. I did not.

Mr. O'Donnell: We object to it.
The Court: Sustained.
Mr. Robertson (producing documents): I will ask that these letters be marked for identification.

The documents produced by Mr. Robertson were then marked by Miss La Bar, the government's stenographer, Exhibits 5 to 21, inclusive, for identification.

504 (By Mr. Robertson, resuming:)

Q. Do you know the handwriting of the defendant Stroud when you see it?
A. I do.
Q. You do?
A. Yes sir.
Q. I hand you papers marked successively Exhibit 5 to Exhibit 21, inclusive, and ask you to look at those, and state if you know, whether they are in the handwriting of defendant—go over them carefully. (Witness examines Exhibits.)
A. They are.

The Court: Anything further from this witness?
Mr. Robertson: I desire to offer in evidence Exhibits "5" to "21" inclusive, and wish to read them to the jury.
Mr. O'Donnel: Before you read them, Mr. Robertson, are those the letters described in the motion passed upon before the tiral?
Mr. Robertson: Yes; they will be the same letters.
Mr. O'Donnell: I would like to ask the witness one or two questions.
The Court: Very well.

Questions by Mr. O'Donnell:

Q. Mr. Reno, you were deputy warden in March, 1916?
A. Yes sir.
Q. That would include the 26th, of course?
A. Yes sir.

Q. And about when were you relieved of your duties as deputy warden?

A. Why, I asked for a transfer, I believe, about four months after that.

Q. That is to say, you were deputy warden up to and including July, 1915?

A. I believe so.

Q. Yes sir—and after that then, you were changed to your present position?

A. Yes sir.

505 Q. Now, while you were deputy warden, this tragedy occurred in the dining room?

A. Yes sir.

Q. And afterwards the defendant was incarcerated in the isolation ward—put in there?

A. Yes sir.

Q. And you may state, Mr. Reno, whether or not, after he was put in there, you had a conversation with him concerning writing letters?

A. I don't remember having any conversation with him pertaining to writing letters—he had that privilege.

Q. To refresh your recollection, Mr. Reno, I will ask you whether or not you advised the defendant that any letters that he would write would be transmitted—that you would take them and transmit them?

A. I don't catch that?

Q. Do you recall that you advised the defendant that if he wrote any letters that you would take them and see that they were transmitted?

A. You mean, sent out of the institution?

Q. Yes?

A. No, that would be entirely out of my jurisdiction.

Q. Did you have any conversation with him and tell him that you would take the letters and transmit them as far as they would go?

A. Not that I recall.

Q. But prisoners in that institution did have the privilege of writing and sending letters through the mails?

A. Under certain rules of the institution, yes.

Q. Yes—now, at the time that Stroud was in the isolation cell, he was accorded the ordinary privilege of writing?

A. Yes sir.

Q. And that privilege authorized him to believe that any letters that he wrote would be transmitted through the mails as you understood it?

A. Yes sir.

Q. And you put no restrictions upon his privileges in that respect, at that time?

A. That was out of my jurisdiction in regard to putting

506 any restrictions on letter writing—that is up to the warden.

Q. That is up to the warden—but under the rules existing in that institution then, when a prisoner wanted to transmit a letter,

he gave it to some officer of the government for transmission through the mails after he wrote it?

A. Yes sir.

Q. He wrote it and enclosed it in an envelope and gave it to some guard or some official for that purpose?

A. Not enclosed.

Q. Well, it was accompanied by an addressed envelop, wasn't it?

A. Yes sir.

Q. And was it placed in a regular recepticle for the receiving of prisoners' mail?

A. Well, not from the isolation building, it was not.

Q. But in other places except in the isolation ward, you did have regular places for the receiving of mail?

A. A receiving box—yes.

Q. And where prisoners would place mail?

A. Yes.

Q. And so far as the isolation ward was concerned, there was some official of the government that would receive the letter whenever a prisoner wanted to send it out?

Mr. Robertson: That is objected to as not cross examination, and being immaterial.

The Court: It is not cross examination.

Mr. O'Donnell: It is not cross examination; it is not intended for that. I will be through in a minute.

Q. Now, these letters, so far as you know, Mr. Reno, were written for transmission, the same as any other letters by inmates of that ward?

Mr. Robertson: That is objected to as immaterial and not proper cross examination.

507 The Court: As I understand it, the inmates of the isolation ward could write letters to be sent out through the mails, but they were turned over to the prison officials unsealed.

Mr. O'Donnell: The Court has correctly recited the statement of the witness.

The Court: Anything else, now?

Mr. O'Donnell: To the introduction of the letters defendant objects for the reason that to receive them in evidence would be to violate the defendant's rights under the Fourth and Fifth Amendments to the Constitution of the United States.

The Court: Overruled.

And to this ruling and action of the Court defendant then and there duly excepted and still excepts.

Mr. O'Donnell: I wish to ask another question.

Q. Mr. Reno, after the defendant—before the defendant was put in isolation, did you observe him occasionally?

A. In a general way.

Q. To ascertain his mental condition?

A. I didn't pay any attention to that—that was wholly up to the doctors.

Q. After he was put in isolation, you may state whether or not, you observed acts upon Stroud's part that caused you to form any conclusion with reference to his mental condition?

—. After he was put in there, not before he was put in there.

The Court: That, of course, is not cross-examination.

Mr. Robertson: We object to that as immaterial and not cross examination.

508 The Court: The objection is sustained.

And to this ruling and action of the Court defendant then and there excepted and still excepts.

Mr. O'Donnell: It is asked for the purpose of showing the man's mental condition when he wrote the letters.

The Court: That is a matter of defense, not a subject of cross examination; this witness was not asked anything at all about that.

And to this ruling and action of the Court defendant then and there duly excepted and still excepts.

Mr. Robertson: Is there any further cross examination of Mr. Reno?

Mr. O'Donnell: I don't recall whether I made the objection to the letters?

The Court: You made objection to the introduction of the letters and it was overruled, and I gave you an exception.

Mr. Robertson: I asked if there was any further cross examination, or may we excuse Mr. Reno? It will take some time to read these. I want to know if I may excuse this witness.

Mr. Kimbrell: I think not.

The Court: You may be excused from the room.

(Witness Excused.)

Mr. Robertson: If your honor please, the witness Mr. Brown, who was on the stand, sends word by Mr. Harvey that he is working nights, and he feels the need of some sleep, and if the counsel
509 would consent, he would like to go home, if counsel will consent?

Mr. O'Donnell: He may go home and sleep all he desires.

And thereupon Exhibits 5 to 21, both inclusive, were received in evidence and read to the jury by Mr. Robertson. And to this ruling and action of the Court, defendant then and there excepted and still excepts.

Said Exhibits 5 to 21 inclusive are in words and figures as hereinafter stated:

Mr. Robertson: Gentlemen of the Jury, Exhibit 5 reads this way:

(EXHIBIT 5.)

If not delivered in ten days return to post office Box 7, Leavenworth, Kansas.
Place your registered number here: 8154.
From B. F. Tice, Mail Clerk, March 27, 1916.
T. W. M.

Mrs. E. P. Stroud,
Juneau, Alaska.

Mr. Robertson: Exhibit 6 reads this way:

(EXHIBIT 6.)

Handed to me by B. F. Tice, on March 27, T. W. M.
Post Office Box 7.

Leavenworth, Kansas, 2/25/1916.

DEAREST MOTHER: I got your letter this evening and I am sorry if I have made you sad. I guess I have done that very thing far too often by not showing my affection when I should. I cannot
510 be hard hearted enough not to write to you after reading your letter altho it was my intention never to write again when I sent you my last letter— Well I may stop writing all to soon any way— I am feeling so badly to night that I would end it all if I didnt have my eye on the morrow—

I got the money O. K. and am glad to get it but I some times feel much ashamed to take it and use it as I do when it comes so hard to you— I guess you intend it to give me pleasure and I use it for that purpose— I didn't get the picture yet but I guess I will get it Monday— you see we dont get any thing like that the same way we do letter but they are held up for a closer inspection.

Mother Darling I don't blame you you are as much of victim of circumstances as I am what I really blame and hate is the system and the church the built it and most of all the people who up hold it— If it had not made your father a dirty, double crossing, hypocrite— a narrow minded bigot, you never would have been brought up the way you were— what get me out of patience with you is that you will try to tell me I am wrong when I can see the farthest ahead of the two of us— and when you refuse to see the conditions like you did (the word here is unintelligible)— I had tried to make all plane to you and then you let your erroneous idea have sway— You took me to task for trying to show you the only path that any one with brains would follow— If you had of even guessed what
511 effort it took to do what I done and all the (the word here is unintelligible) of thought that was put in those instructions and all the hope that was placed on you you would have acted different I know—

Sunday Morning

I have read your letter over many times and each time my breast

chocks up with emotion I have been think all night and as a result I can only say that I am sorry, very sorry things are as they are but I can see no hope— If there was one person who cared enough for me to try to understand and help me I would make an effort but there is none and I am very tired— I am sending you an other poem of the same kind as the last please do with it as you done with the last—

Marcus was over to see me yesterday and as it was Saturday they wouldnt let him in. He had some fruit and candy for me which I get tho— I guess if every thing goes well I will get to see him next week— The chance are I wont tho— It is raining to day and we wont get the yard—

Mother I should feel very very badly if you were to pass away but do you know that I can see very littel left in life for either of us— You have had the best of me tho at that for you had the pleasure of your youth the satisfaction of a family— I have for years longed for a family and a home where I could be happy but that like every thing has been denighed me—

I gues Minnie will never write to me again. I have tried my best to insult her in my last letter— she told me about Arthur Krahn standing a chance to get life in Walla Wala. She spoke of it as tho she thought that is was just the thing— well she know
512 what I think— I have wished a peace of hard luck on to her which she hasnt a chance to avoid and that is that she will some day know what her word "life" realy means— She will for the chance are 100 to 1 that that kid of hers will go wrong for neather of its parent know enough to help it go right— I feel sorry for the boy—

Say Do you know there is something funny about me. What I wish when I am in a certain State of minde always comes to pass— I wished a Stroke of parallisis on a man last summer who was in perfect health. I was bound by my word that I would avoid trouble with him and while I realy had nothing against him I wanted him out of my cell and would have made trouble if I hadnt of given my word— 48 hours after I expressed the wish he was in the hospital with the Stroke— I have had the same thing happen fifty times with people and things— The funny thing is when I am in that state of minde I can never wish any thing good. Or any thing directly for my self—

I must say good by Mother Darling
Your loving Son—

R. F. STROUD.

A Kiss for my littel sweet Heart who I love better than life—

I am weary—Life seems dreary
And the world is bleak and bare
I am lonely, Oh so lonely,
And there's none who think or cair—

In my sadness—close to madness,
All the world has turned away.
All is blindness—There's no kindness,
For the friend of yesterday—

Every meeting—every greeting,
Of my fellows, shows to plane—
That they'r acting—Only acting
And it fills my heart with pain—

So I'm lonely, But if only,
There was one who'd realy cair,
I'd be cheery—never dreary—
But that one, I find, nowhere—

During the reading of the foregoing Exhibit 6, the following colloquy occurred:

The Court: There is no objection on the ground of materiality? It is very evident that some of it is immaterial to the issues. If you want all of it read if any of it is read, very well. If there is an objection on the ground of materiality, I will have to check it over.

Mr. Kimbrell: There is no objection on that ground. The only one made is the one saved by Mr. O'Donnell.

The Court: Very well. Proceed.

Mr. Robertson: I have a typewritten copy that is more easily read, than the originals, which I am reading from. (To defendant's counsel:) You may follow me from these if you desire.

Mr. Kimbrell: No.

(Mr. Robertson then read Exhibits 7 to 21 inclusive, as follows:)

(Exhibit 7 is as follows:)

EXHIBIT 7.

If not delivered in 10 days return to

Post Office Box 7.

Leavenworth, Kansas.

T. W. M.

8154. Place your register number here.

Mr. M. M. Stroud, 1318 Harrison St., Kan. City, Mo.

514 (Exhibit 8 is as follows:)

EXHIBIT 8.

Post Office Box 7.

T. W. M.

LEAVENWORTH, KANSAS, 3-29, 1916.

My Dear Brother:

I got a letter from Mother last night and she told me your address so I will write to you. I wanted your address very badly and would have written before if I had known of it—

I got the fruit and candy Saturday and I am very sorry I didn't get to see you and I hope I may see you soon— I guess you know by this time that I killed a guard Sunday noon— I am at present in Sol. confinement. I am getting on very well and in fact feel better than I have for some time—The reason of it is that my mind is at rest. I guess you have seen the papers but I don't know how neer they are speaking the truth—I have not seen them—Any way if they give any reason for the killing you can figure that it is only a guess for I have not told any one why I done it.—They asked me and I told them I would tell that to a jury—I guess I will get life for it but that is of no moment—I will be just as well off doing life as the way I was before—

Say when you get this write to mother and tell her what I have done and also tell her that I don't wish her to send any money on the case for I wouldn't spend any even if I had it—I can get "by" just as easy without a cent as I could any way for I can't
515 denigh killing the man and my reasons may or may not be considered sufficient to justify my action, the most they can do is to give me life anyway and I don't cair for that if I can make them send me to one of the other prisons—I shall try to get sent back to the "Island"—

Say Kiddo I sure wish I could see you—If you come over here again and they don't let you in or if they have refused to let you in since Saturday, go to Judge Pollock's court (he is U. S. Judge for this District) and ask him for an order to see me—He will give it to you—and then you can get in without trouble—I don't know where he is holding court at but you can go to any new-paper and they will tell you that—I don't think they will refuse to let you in for they have not tried to punish me in any way or take my grade—

I hope you are getting on all O. K. kiddo and I hope you will never go the rout I have—I couldn't do different, if I could you know I would for I am a very mild tempered man.

So long Boy

Your Loving Brother

R. F. STROUC.

March 30, 1916.

Letter written by Stroud 8154

A. J. RENOE.

516 Post Office Box 7. T. W. M.

LEAVENWORTH, KANSAS, 3-30, 1916.

Dear Brother:

I just got a cabel from mother—She wants to come down here—wire her and tell her not to—But if she should come anyway be sure and meet her—Tell her in the wire to waite for letter from me before she leaves Juneau—

I wrote you last night and the letter left just a few minutes before the wire came—

If there are any more developments I will write you—

Your loving Brother,

R. F. STROUD.

Letter written in my presence and handed to me March 30, 1916.

A. J. RENOE.

517 (Exhibit 9 is as follows:)

EXHIBIT 9.

If not delivered in 10 days return to
Post Office Box 7
Leavenworth, Kansas.

8154
Place your register number here.

T. W. M.

Mrs. E. J. Stroud
Juneau
Alaska—

(Exhibit 10 is as follows:)

EXHIBIT 10.

Isolation.

Request for Extra Writing Privilege.

United States Penitentiary.

518 LEAVENWORTH, KANSAS, 3-30, 1916.

The Warden:

Prisoner R. F. Stroud, No. 8154, who is now in possession of his privilege tickets requests permission to write an extra letter next Sunday

To Mrs. E. J. Stroud
Juneau
Alaska

about

Business
Mar 31 1916

ROESCH,
Night Guard.

Granted
THOS. W. MORGAN,
Warden.

NOTE.—This permit must accompany the letter to the Mail Clerk's Office. The above request will be taken by the Night Guard and forwarded to the Warden next morning.

Form 48.

Post Office Box 7

T. W. M.

LEAVENWORTH, KANSAS, 3-31, 1916.

519 Dear Mother

I received a visit from Marcus this afternoon— Say he is sure a fine kid— I am very glad that I have such a fine brother we had a real nice visit but of course we couldnt talk as freely as we would like—
There were many thing I would have liked to tell the boy and also many things I would have liked to ask him, but as you will understand it was out of the question, to do as I would have liked—
The warden received your wire, and I was notified to that affect— I sent word to Marcus to wire you not to leave Juneau until you get my letter— He didnt think it necessary to wire but wrote you— I hope you get this in Juneau for then I know will not come—
Dont come mother— I would greatly love to see you but if you come it can do no good— Dont worry about a lawyer for I have a defence that is better than any lawyer would frame up— It would be only useless expence to come down now later it may be different you see I will not be tried for eight or nine months and if you wished to come then it would be alright but to come now would be worse than foolish— Now dont worry you know what I was up against in Juneau— well the people here are not neer as much affected as they was in Juneau as neer as I can understand and I have an even better deffence that I had there— I can not
520 explain my self and couldnt if you were here— my strength is in keeping my face shut— I have as yet give no one any hint what ever that can tell them any thing— you see I talked with the man first— no one knows what we sead to each other— They have made two or three guesses but they are all wrong— The

warden tried this after noon to impress Marcus with the gravity of the thing and he didnt seem pleased when I smiled into the boys eyes never the less I think the Boy under stood me— Did you get the letter I wrote Sunday befor the killing came off— I hope so—

Well mother I can not tell you as much as I would like to— I can say that I am very sorry for the mans family, but he wouldnt be sorry for mine if it was the other way around— I cant say that I am in any way sorry for my action— I have acted right in the mind of all fair thinking people who have any knowledge of the conditions— The public will take the same vew I am sure when they realy under stand the people of Kansas as a rule are pritty liberal and the are not fools enugh to over look the conditions as far as I can under stand the papers have been as fair as could be asked of them— Of course things must look bad now for I wont talk but wait till I do it is ten to one I have the papers with me— They are the people and it is them that tries a man—

I love you Mother, Dont wory. I am getting on very nicely since the trouble for I have nothing to worry me— Try and take my vews on this it is all O. K.

Your loving son

R. F. STROUD—

521 Mr. Robertson: The next is Exhibit 11, letter of April 2, 1916. No envelope with it is there?

Miss La Bar: Does not seem to be.

(Exhibit 11 is as follows:)

EXHIBIT 11.

T. W. M.

Request to see [Warden or Deputy.]*

United States Penitentiary,

LEAVENWORTH, KANSAS, 4-2, 1916.

Prisoner R. F. Stroud No. 8154, requests audience with the Chief Clerk for the following reason: To order Leavenworth Times for three months——

Two lbs. of fudge candy 40c.

R. G. BROWN,
Guard.

NOTE.—The above request will be taken by the night guard and forwarded to the Warden or Deputy next morning.

522 Audience held —— 191—.

Disposition of case —.

——— ———,
Warden.

[*Words enclosed in brackets erased in copy.]

Form 53.

Post Office Box 7.
T. W. M.

Apr. 3, 1916—letter written by Stroud #8154 yesterday.
A. J. RENOE,
Deputy Warden.

LEAVENWORTH, KANSAS, 4-2, 1916.

Dear Friend—

I and also Mr Bonner received your letters— As you know he got a (the word here is unintelligible) I dont know if he has answered your letter or not I havent seen him for two weeks—

I have what may be a peace of supprizing news for you, and it will explain why I have not seen Mr. Bonner one week ago today at the noon meal I got up from the tabel and walked up to a guard who was standing in the aisle just ahead of where I was sitting— we talked of few minutes and he started to walk a way I spoke and he stoped then started away again I made a quick movent with my left hand and he straightened up real quick and a very funny look on his face then he staggered and fell he took sick and died of heart trouble shortly after that— and as a result I am in solitary confine-
523 ment waiting to be tried for murder— You see the people seem to think his heart was alright befor I made that move with my left hand— I wasnt but I wont discuss that— After I made that move it had a good sized dagger wound in it.

I can not discuss my reasons for the action but I can tell you that my conscience is as clear as a new born babes— I think you know me well enough to understand that I must have very good reasons befor I could act that way and still have a clear conscience— I have up to date answered all questions with the statement that I would tell my reason to a jury— You see I can not take any chances on my neck by giving any hint of what my defense will be— I am not the least bit worried tho for I am sure that I will convince the public that my actions were forced— I have not seen the papers but I heard last night that one paper sead that 1500 other prisoners stood up in approval of my action—— From the reports that I get it seems that the paper are all inclined to give me the best of it even with out an explanation from me.

My Brother was to see me day before yesterday and I had a real nice visit with him— The poor Boy (he is 18) couldnt understand what it was done for and seemed to feel very badly I hate to make the kid feel bad for he is a good kid, He thinks there is no one like his big brother— He is going to school in Kan-city and had just come from the (unintelligible word) a few days befor this came off— he was to see me the day befor and the wouldnt let him in after coming three thousand miles because it was a half holiday of
524 course if I had of been a snitch with a star it would have been

different— just the week befor a snitch got a visit on Sat. and the called him out of the show— (of course this is a very fair administration)? I will say tho that they have not tried to give me the worst of it since the killing and I am getting on nicely— They have placed another man in here and are starving him because some dirty snitch told them that he gave me the knife and in truth he never even seen that knife I have had it on me ever since last spring I made it in June I think—

I will have to close for lack of paper I tried to get another sheet but I guess it costs to much any way I could get it— Say did you ever write the (unintelligible word) about Alaska as I told you to

BOB.

525 (Exhibit 12 is as follows:)

EXHIBIT 12.

8154
Place your
register num-
ber here
If not delivered in 10 days return to
Post Office Box 7
Leavenworth, Kansas.

T. W. M.

Miss Bessie Loesges.
opo Dr. E. B. Beckwith
R-1400 Marshell-Field Annex,
Chicago, Ill.

(Exhibit 13 is as follows:)

EXHIBIT 13.

Post Office Box 7

T. W. M.

LEAVENWORTH, KANSAS, 4-4, 1916.

526 Dear Friend

I got your welcome letter yesterday— I had written to you Sunday but when I got your letter I had the one I had written stopped (it had not been mailed) and am writing this in its stead—

I can understand your feeling about Greenland and in fact most people in this part of the country feel just as you do— I am glad they do for most of them are not the kind that would tend to keep Alaska Alaska— They would spoil the country if they went to it but with you it is different— If you could talk to my self or my mother I know you would looze that Greenland idea quick for you would see where it (alaska) had what you miss so much in the city and hoped to find in Cal. I think I understand what that is—

Isnt it the feeling of fellowship with those around you and with the big world out doors? Isn't it that you wish to get away from the cramp of petty conventions? To live in stead of just stay— If that is right you will find what you desire, to a far greater exent in alaska, than any where else on earth— Cal. dosnt have it and Seattle only has it to a small extent altho it is the best town in the United States in that respect— In Alaska all men ar brothers
527 to a greater extent than any where else on earth—

It was two weeks Sunday since I saw Mr. (unintelligible word here) and I dont know if he has written to you or not but he told me he had a note from you and that if I wrote to you to give you his best regards— I guess he will write soon if he hasnt all ready— I have no hope of seeing him any time soon—

You desire to know how I am getting on well I will let you judge, but I can tell you I am feeling better than I have for some time— I am in Sol. confinement— As you don't read the papers much I guess you have heard nothing of it— Now you are saying of what— I will explain—

Sunday March 26th at the noon meal I got up from the tabel and walk up the aisle to where a guard was standing and started to talk to him we talked very quitly and stood very close to gether but any one looking at our faces could see that our words must be very intence— we all at once brake away from each other the guard reaching for his club which was under his left arm with his right hand and my self making a very quick movement with my left hand which had been at my side— Then we both stepped back and the guard seemed to be sick he caught at the tabel behind him staggered a littel and slipped to the floor he died shortly after
528 wards of heart failure— The (unintelligible word here) seems to hold that his heart was alright befor I made that move with my left hand— It wasnt and I will have to prove that when I go to trial when they give the dead guard the once over they found that he had a dagger wound about six inches deep that passed through his heart.

You will think me the coldest of men to write this way after killing a man— I think you know me well enough to know that I would never do that if it could be avoided— I can't tell you why I done it for I have kept that to myself up till now and must continue to do so if I wish to save my neck— I have only one neck and cant spare the use of it— I am not worrying tho in fact I have every reason to believe that I will get a square deal in court and if so I will be in no danger whatever— Of course that is if I manage my case so that a jury will be able to understand my real reasons for my action— If I cant I will not greave—

My Brother was here to see me the 25th from Alaska he came down to go to school in Kan. City they wouldn't let him in cause it was a half holiday of course if I had been some snitch it would have ben diffirent just the Saturday befor an other man was called out of the show to receive a visit— The Boy heard of the killing
529 and came over the 31st I had a real nice visit with him and sure enjoyed seeing the kid. He is only 18 and of course

thinks there is no one just like his big brother— I was real sorry for the Boy he seemed to feel very badly, but tried to cover up his feelings the best he could— Our Christian warden had to take it upon him self to try and impress the Boy with what an awful crime it was-- I smiled at the Boy and told the warden that I didnt think a jury would take that vew. The men dont take it as neer as I can understand one paper stated that 15000 of them stood up in approval of my actions— The guard left a wife and the other prisons made up a purse for her so I am told but one man when he turned in the list of names to the Deputy told him that the men gave for the woman but that the money shouldnt be used against me— my self and the other men are all sorry for his wife— Sorry that she used such poor judgment it picking out a man— I have learned all this from men who have came in here for punishment since the thing came off. You see my self and the man who killed Smithy are held in the same place as the man being punished but we are treated as first grade (unintelligible word here) In fact I have no complaint of my treatment since the trouble.

Mr. C. E. Edgar of K. C., a theosophist came to see me and asked me one question— That is how I reconciled my action with
530 Theosophy— I told him I did not try but that I thought the best of men would brake down under some conditions— He gave me the lodge address and told me that they would be glad to do any thing they could for me and to write them if I need there help at any time. I do not know if I will ever ask help from there or not but I do know it is fine to see people who are clean enugh of heart to offer there help with out me giving any reason what ever for an action which they must more are less deplore— As I am out of paper I will close—

Sincerely—

R. F. STROUD—

531 (Exhibit 14 is as follows:)

EXHIBIT 14.

If not delivered in 10 days return to
Post Office Box 7
Leavenworth, Kansas.

8154
Place your register number here.

T. W. M.

Mr. B. F. Stroud
Omo Ranch
Eldorado Co.
Cal—

(Exhibit 15 is as follows:)

EXHIBIT 15.

Isol.

Request for Extra Writing Privilege.

532 United States Penitentiary,
Leavenworth, Kansas.

April 6— 1916.

The Warden:

Prisoner R. F. Stroud.
No. 8154, who is now in possession of his priviledge tickets, requests permission to write an extra letter next Sunday to his Father B. F. Stroud.
Oma Ranch Cal. about Buisness.
Apr —7 1916.

R. G. BROWN,
Night Guard.

Granted.
Denied.
THOS. W. MORGAN,
Warden.

NOTE.—This permit must accompany the letter to the mail clerk's office. The above request will be taken by the night guard and forwarded to the Warden next morning.

Form 48.

533 Post Office Box 7
T. W. M.

LEAVENWORTH, KANSAS 4-7 1916

Dear Father

I will drop you a few lines—
Things have been some what up set here for me of late— March 26th I got up from the table at the noon meal and had a littel talk with the guard who was standing in the aisle ahead of where I was eating— the guard took sick and died all of a sudden— He died of heart trouble— I guess you would call it a puncture of the heart— Any there was a knife hole in it— They are holding me for murder— My case goes up befor the grand jury next Wensday and I shall try to get a trial at once—
Marcus happened to be in K. C. going to school and came over to see me last week he told me he had been going to write to you for a long time but had lost your address— I gave it to him and he said

he would write soon. He and Mother were both to see me to day and I had a fair visit with them— Mother just got in K. C. last night she saw of the killing in the paper and took the first boat south—

Mother says she shall get me a lawyer and try and see that I get a square deal— I hate to see her waist her money for I
534 thing I will have as good a chance any way— And on the other hand I am so tired of doing time that I dont cair much what they do about it— The worst they can do would be to give me life— I think I have a good chance to beat them—

I have never give any one any reason for doing it so they wont have much to work on only that I killed him and that wont do much good for I will admit that—

Well Father I will have to close for lack of news

Your loving son

R. F. STROUD—

The above named prisoner admits to me that he wrote this letter.

L. J. FLETCHER,
Deputy Warden.

535 (Exhibit 16 is as follows:)

EXHIBIT 16.

In not delivered in 10 days return to
Post Office Box 7
Leavenworth, Kansas.

T. W. M. 8154
Place your register number here

Miss Henrietta Siemon
2309-Jackson St.
Seattle Wash

(Exhibit 17 is as follows:)

EXHIBIT 17.

Post Office Box 7

T. W. M.

LEAVENWORTH, KANSAS 4-9 1916

536 Dear Friend

Mother was here to see me Friday— She gave me your message— I am glad that my friends still have me in mind at this time—

You were no doubt suprized at my actions— I am sure you will have enugh faith in me to beleave that I would never kill any one if I could avoid it— I have done nothing that does in any way hurt my conscience, and I have been taught that conscience is the voice of god— I dont know what men will think of my action— I dont much cair— I am told that 15000 of my own people look

up on it as right— I hope a jury of 12 men who are not of my own people will take the same view if they do I shall thank them— If they dont I shall get life I guess, but even then my vews will remain the same—

Say the kid brother was over to see me twice— He is a fine Boy and my how he has growed since I seen him— To me he looks much old than he realy is— I sure would like to be out with the Boy were my experience could be of some value to him— I think we would grow very close to each other if we could be to geather for I sure like what I have seen of the Boy— And do you know he is sure a fine looking Kid— It is a wonder if the girls are not all bugs about him— In fact I am real proud of him— I dont know what he thinks of me but I do beleave he thinks a
537 good deal of me—

A member of the K. C. Thesophical lodge was to see me and they asked what they could do for me— It made me feel pritty good to see people who never saw me take so much interest in me just because we are of one belief— I have never noticed christian standing by one another like that— Say if I was booked up as a Methodist— Do you think the Methodists would send any one to see me to ask me that question— No! If they sent any one to see me it would be to tell me to ask god for what I needed— I gave my mother there address and told her to go to them she will find friends there ready to help her at this time—

I just this minute received your letter and was of course very pleased to hear from you— Say I didnt even know (unintelligible word) was married— so you are an Auntie now—

Please give the folks my best regards and tell Arthur to tell Clyde Hello for me if he sees him again and that I would be please to receive a letter from him once in a while

So long for this time

R. F. STROUD

This letter was given to me by Stroud #8154.

L. J. FLETCHER,
Deputy Warden.

April 9-16.

538 (Exhibit 18 is as follows:)

EXHIBIT 18.

If not delivered in 10 days return to
Post Office Box 7
Leavenworth, Kansas.

8154
Place your
register number
here

T. W. M.

315

Mrs. David McCartney
23 ove — E. Jefferson St. — S. E. Corner.
Seattle
Washington

539 (Exhibit 19 is as follows:)

EXHIBIT 19.

This letter received from Shroud #8154 April 16-16.
L. J. FLETCHER,
Deputy Warden.

TWM.
Post Office Box 7.

LEAVENWORTH, KANSAS, 4-16, 1916.

Dear Friend

I would have written to you long ago if I had been sure of the address— Mother was here Thursday and I asked her if you still lived the same place and she told me you did and I thought I would write and express my belated thanks for the book you sent me last year— I think it a real nice book and very interesting— In fact I find all books on the subject of theosophy interesting— My choice of them all is—Light on the Path— I was lucky enough to receive a copy of it at Christman— I have been very fortunate in respect to books, for there are very few theosophical books written by the heads of the movement that I haven't had the chance to read and most of them I have read more than once—

I did not know that you were a theosophist until Mother told me. I have tried to make one of her and I believe that this last affair of mine has put her in a position to look at it with favor— She has had a chance to meet real Theosophists and I think they have made a very favorable impression on her— She told me last spring how much your views impressed her—

540 You were all no doubt suprized at my late action— You will say "how can he be a theosophist and act that way"?— I will have to explain I guess— I have always all my life had an inner feeling that the only true theory of the hereafter was reincarnation— I seemed to know I had lived before, when I was a very small child— I always had my be believe laughed at when I was young and I didn't know that there was any other people who held it until I went to prison— I spoke of it on night to my cell mate and he knew something of the theosophy and knew people in the prison who would let me take books on the subject— I read the books and liked most of the theory but I soon saw that there was two phases of it— The Theory and practice of Ocultisn— The molding of life with respect to the theory of Brotherhood and

Karma. I saw where the first was of more danger than value while the second was of the highest value attainable— I started out to live by the second phase— I am not a perfect being by any means, but this much I have done— I have treated all the people of my own kind as the teaching would dictate— That is so long as they would live up to the laws of our world— As a result I have been spoken of, by people I never spoke to, as the kindest and most charitable man in the prison— On the other hand I have no love for the parasites of either your world or mine— I speck
541 of the guards, police, and snitchs— And all others who use the misfortune of my self and men like me for their profit— I find nothing in my conscience that condems my action in regard to them— In fact I have tried to make conscience my guide for I know that a man will surely suffer if he doesnt, but at the present time I find that my conscience aproves of my action and would disaprove of any other manner of action under conditions as they are— If I failed to fight for the rights of my self and my fellows I could never have a clear conscience for I must regard myself as a coward— No God ever made a man to be a coward—

Mother has obtained the best lawyer in the state and I have a fine chance to beat this case— I learned yesterday that the grand jury had found a true bill for first degree against me. I am pleased for I have a better chance against a first degree case than I would have against a man slaughter case—

Give all my best wishes
As ever

R. F. STROUD

542 (Exhibit 20 is as follows:)

EXHIBIT 20.

If not delivered in 10 days return to
Post Office Box 7
Leavenwarth, : : Kansas
T. W. M.

8154
Place your register number here

Mrs. E. J. Stroud
1303 Harrison St.
Kan. City
Mo.

(Exhibit 21 is as follows:)

EXHIBIT 21.

543 Post Office Box 7

LEAVENWORTH, KANSAS, 4-23, 1916

T. W. M.

Dearest Mother

I received your letter and cards O, K. and was pleased to get them. The cards were very pretty—I also had a short letter from B. F. He is stll in Cal. He hadn't got my letter yet telling him of the klling—He was telling me how he hoped I would be out soon—I got the Lawyers letter too. I was in hopes he would be over befor this—If you see him you can tell him that I hope he can get that order, but if he cant I want to see him any way—Of course in that case I wont be able to go into the case the way I would like to, but that can not be helped—Any way I have it all in my head and there will be very littel that can be done—There is one of my witnesses who I would like to have this fellow take a deposition from for he will go out in about a month and if I dont get my trial by that time I will looze him—

Say Mother did you go to that theosophical meeting, you sead you was going to—what do you think of the people there I have met many theosophists and have always found them pritty much alike and always ready to do good—

I have not heard from my theosophical girl in Chi yet but guess I will get a letter from her this week.

544 You didnt say in your letter when you would be over—I had kind of expected you last week, but I dont know when to expect you now—Did (unintelligible word here) say any thing about any letters coming there for you from me—It would be well to ask her and insist in her sending them to you if they have—Also ask Marcus if he ever got that letter I wrote to him right after this thing came off—

I wrote Mrs. McCartney last Sunday thanking her for the book. I wrote her a real nice letter—

I havent heard from Minnie for some time but I am not suprized for she wrote me about Arthur (unintelligible word here) being pinched and standing a chance to get life—She spoke of it with what seemed to me to be satisfaction, and I told her what I thought of a person who would feel that way after they had had as many chances to know better as she had—Iguess it hurt for I showed her where, like most other christians, she was a back biting, hypocrite.

Well I am getting on as nicely as could be expected under the circumstances—

The next time you come to see me have two or three dollars in your pocket book for you will have use for them.

Say you remember Mr. W. J. Corrigan of Seattle dont you? I know you must. He is here, doing six years it might be a good

idea to write to him—My self and him have been very
545 close friends ever since he came here two years ago.
I will close for this time
Your loving son

R. F. STROUD.

P. S.—Give Marcus my best regards and tell him I sead be good—

This letter was written by the above named prisoner.

L. J. FLETCHER,
Deputy Warden.

546 Mr. Robertson: Now, I am inclined to think, Your Honor, that that is all the government's evidence, although I would like to talk the matter over with Mr. Harvey, if the Court will permit me.

Mr. Kimbrell: Then, we will recall Mr. Morgan.

THOMAS W. MORGAN, recalled as a witness, for further cross examination on the part of the defense, testified as follows:

Cross-examination.

By Mr. Kimbrell:

Q. Mr. Morgan, what was your rule applicable to Mr. Stroud and other prisoners, if he wanted to write a letter to his mother or to his friends?

A. The rule is and was at that time, that prisoners may write one letter each week as a matter of right, if their—if his conduct record is good, if they are in the first grade, and occasionally special letters are granted.

Q. But your rule required Stroud to submit each letter to your perusal in each case, before it was mailed out?

A. Yes, all letters are submitted in that way, except that there are so many of them that I have a mail clerk who reads most of them.

Q. That is, you permitted no letter of his, to his mother or to his lawyer, whether it spoke of his defense or any other matter, to go without reading it?

A. Yes, that is true, I read all his mail.

Q. And your office determined, after reading, whether it passed out through the mail?

A. It did.

Mr. Kimbrell: That is all.

547 Redirect examination.

By Mr. Robertson:

Q. Mr. Warden, do the United States mails in any way enter the prison?

A. They do not.
Q. They do not—where do you get your mail?
A. We get it down to the post office, except——
Q. This building here?
A. This building here—yes sir.
Q. How are your letters that you determine shall go in the mail, how do they get into the mail?
A. The usual routine, they go up to the mail room and are there read by the clerk, and he determines if any of them seem of doubtful character, such as ought not go out for any reason whatsoever, they are brought down to me and I read them.
Q. Do you mean that the United States has a mail clerk in your prison?
A. We call him our mail clerk; he is not in the Post Office Department, but he is an employe of the institution out there, whom I have in charge of that room.
Q. I will ask you if you have a well recognized rule and regulation of your institution that you had durng the time that the letters in this case were written, which provides that no letters or document in any way giving information regarding the commission of a crime was to go out of the institution?
A. That is true.

Recross-examination.

By Mr. Kimbrell:

Q. You know Ex-Attorney General Boyle very well?
A. Yes, we have been acquainted a long time.
Q. You knew at the time these letters were written by Robert Stroud that have been read here, that General Boyle was his attorney?
A. I can't say as to that.
Q. You knew that General Boyle was his attorney?
A. I can't say just when he was employed. I knew it later; anyway.

548 Q. In case General Boyle wanted to write him a letter mentioning any fact of evidence or any witness that might be used or mentioning anything about this case, did you under your rules investigate that letter or read it, and determine first whether to deliver it to Shroud or not?

A. I read all those letters, but as a matter of fact no letter to Stroud from the attorneys or to the attorneys from Stroud was held up, at any time. I will further say that every time his attorneys were allowed to have a conference with him without a guard being present, which is contrary to our rules.
Q. And since I have been in the case, if we wanted to ask him any question about the case, or if he wanted to communicate any information to his attorneys, all these letters had to pass through your hands?
A. Yes indeed.
Q. And you determined whether or not to deliver them after reading them?

A. All his mail I read, and passed upon, but I think I will renew my statement that no mail communications between the prisoner and his attorneys was held up. I decided which letters to hold up.

Q. Certainly not; I simply wanted to get at the impossibility of the prisoner communicating with his attorneys without its passing under your observation?

A. You are right in that.

Mr. Kimbrell: That is all.

(Witness excused.)

JOHN M. PURCELL, recalled for further cross examination, further testified as follows:

Recross-examination.

By Mr. Antres:

Q. Captain Purcell, do you know a convict by the name of Clyde Stratton No. 8556?

A. Yes sir.

Q. Where did you first meet Stratton?

A. In the—I first met him in the Deputy Warden's office when he was brought in as a prisoner from, I believe, Illinois,
549 some place—that is when I first seen him.

Q. You next met him outside the prison, in Ohio, did you not?

A. Yes sir, in Loraine, Ohio.

Q. He escaped from the federal penitentiary up here?

A. He did, yes sir.

Q. And you went to Ohio and brought him back?

Mr. Robertson: That is objected to as not cross-examination.

Mr. Antres: It is in regard to a statement that the witness made.

The Court: Go on, we shall see shortly.

Q. On your return from Ohio with Stratton, I will ask you if you had a conversation with him concerning the killing of Guard Turner?

A. I don't recall of having any conversation—it might have been mentioned—I don't recall it.

The Court: A little louder, Captain.

A. I don't recall any conversation with Stratton in that regard.

Q. Can you fix the time when you brought Stratton back from Ohio?

A. I don't recollect the date.

Q. Just your best recollection?

A. I could not give you the exact date now.

Q. It was right after the killing of guard Turner?

A. I believe it was along in the summer, July or August, of that year.

Q. Subsequent to the killing?

A. After the killing?

Q. After the killing?
A. Yes sir.
Q. I will ask you—Mr. Stratton had been confined in the Federal penitentiary at Leavenworth, prior to the killing of Turner, had he not?
A. Yes sir.
Q. And it was after that that he escaped and was caught in
550 Ohio, and you went after him and brought him back?
A. Yes sir.
Q. Now, I will ask you, Captain, if you didn't say to Stratton on that return from Ohio, to the Federal penitentiary, in substance or effect, "I told Turner that I expected him to get hurt" before he did, because he was getting pretty raw with that club, but I didn't expect Bob to do it, because Bob was a good fellow."?
A. I did not.

(Witness excused.)

Mr. Robertson: I am inclined to think, your Honor, that the government's case is all in, but I would like, if it is not imposing on your Honor, I would like to have a little conference.
The Court: How long will it take to get those witnesses down here?
Mr. Morgan: About thirty minutes after we were first advised. About fifteen minutes from now.
The Court: Very well; we will come in as soon as we are advised that some of the men are here. We will take a short recess.

After a short recess, the court resumed the trial and the following proceedings were had:

The Court: Are you through, Mr. Robertson?
Mr. Robertson: Yes sir; the government rests.
Mr. O'Donnell: We submit to the Court a request for an instruction.

And thereupon the defendant submitted to the Court in writing and asked the Court to give to the jury a peremptory instruction
in the nature of a demurrer to the evidence on the part of
551 the government, which instructions asked were in words and figures as follows:

I.

The court instructs the jury that you must find the defendant not guilty.

II.

The court instructs the jury that under the indictment and the evidence, you must find the defendant not guilty of murder in the first degree.

III.

The court instructs the jury that under the indictment and the evidence you must find the defendant not guilty of murder in the second degree.

IV.

The court instructs the jury that under the indictment and the evidence, you must find the defendant not guilty of voluntary manslaughter.

V.

The court instructs the jury that under the indictment and the evidence you must find the defendant not guilty of involuntary manslaughter.

(Endorsed:) Filed June 26 1918. F. L. Campbell, Clerk.

Which instructions asked by defendant were each and all refused by the Court, to which ruling and action of the court, and to each and every of such rulings and actions defendant then and there duly excepted and still excepts.

552 Mr. Kimbrell: May we proceed now?
The Court: Yes.
Mr. Kimbrell: Let us have prisoner Murphy.

GEORGE MURPHY, called as a witness on the part of the defendant, having been duly sworn, testified as follows:

Direct examination.

By Mr. O'Keefe:

Q. What is your full name?
A. George Murphy.
Q. You are a prisoner at the United States penitentiary at present?
A. Yes sir.
Q. Were you a prisoner on the date of this occurrence?
A. Yes sir.
Q. Where were you seated that day, with reference to the place where Stroud had his seat—were you in front of him, or behind him?
A. I was in front of him.
553 Q. About how many seats or tables in front of him were you?
A. About six tables in front of him.
Q. Now those tables there bring the men how close to each other, comparing it with the distance the jurors, the front row of the jurors are with the second row?

A. Well, they were about two foot in front of each other, say.

Q. Would that be about the same distance these men are or a little bit further than these men are?

A. That would be about the same distance, with a table in between them.

Q. A table in between them?

A. Yes sir.

Q. Now, using this diagram, saying this is the east side of the room here and this the west side, this the north and that the south side, and here, somewhere in front, the captain's desk, in what—in which of these tiers were you seated on that day?

A. Seated in the second section there.

Q. This man standing up here with a guard near to him—would they be somewhere in the neighborhood of where you were seated?

A. I was seated about where that waiter is, right there.

Q. Right here?

A. Yes sir, right about there.

Q. Where were you in those seats, the first, second or third man?

A. The first one.

Q. The first man?

A. Yes sir.

Q. And Stroud—he was six seats behind you?

A. He was six or eight—I don't know just exactly, but about that many.

Q. What was the first part of the trouble you saw?

A. The first part of the trouble I saw was when Stroud stepped out of the aisle—stepped into the aisle, rather.

Q. Now, at the time he stepped into the aisle, where was the man, Turner?

A. The man Turner was about two feet or three feet in front of him.

Q. In front of him?

A. Yes sir.

554 Q. What was apparently going on at that time between Turner and Stroud?

A. Well, they seemed to be conversing about something or other, talking about something.

Q. Now, where were the men who were waiting on the tables, on that tier, at that time, do you know?

A. Well, I don't know, I happened to look around to see where one of them was, and I could not see any of them.

Q. What was happening at the time?

A. At the time Stroud was talking to the guard, talking with guard Turner.

Q. State just what you saw, and as you saw it, at the time?

—. Well, as I turned around to see where the waiter was, I saw Stroud step out into the aisle and talk to guard Turner and they was talking there for a few seconds or so, when of a sudden I saw the guard reached for his club, and when he reached for the club Stroud made a grab at it, and the guard jerked it out of his hand.

Q. Stroud made a grab for it—what do you mean by "it"?

A. The club.

Q. Did he get hold of it?

A. Yes, he got hold of it.

Q. How?

A. He got hold of it with his right hand and the guard jerked the club out of his hand, and Stroud grabbed it again with both hands, and the guard jerked it again.

Q. Did Stroud get hold of it with both hands?

A. He did. He grabbed it with both hands, and the guard jerked it away again and raised it up in the air as though to strike him, and Stroud's left hand went to his left side and right out again quick, and hit this man in the breast and then this man staggered while his club was in the air, and kind of turned around a little bit facing the front, and then he dropped to the floor.

Q. Now, while that was happening, where was the captain, Purcell, during that time?

A. Captain Purcell was sitting at his desk, in front of the dining room.

Q. Seated up here somewhere?

A. This seat right up there.

555 Q. Now, from the position Captain Purcell was in there, could he well see what was happening down here?

A. I don't know whether he could or not; I think he could, if he was looking.

Q. Now, did you see Captain Purcell rise and go down there?

A. Yes sir, I did.

Q. Was he down there at any time during the catching of the club and the pulling of it and pulling of the knife?

A. No, he was not.

Q. Where was he, then?

A. After this man fell to the floor, then Captain John came down from the desk.

Q. That was after he fell to the floor.

A. That was after he fell to the floor, yes sir.

Q. And after it was over?

A. Yes sir, it was all over then.

Q. Now, what did you prisoners, do, when that man fell to the floor, there, did they remain in their seats or gather around?

A. Some of them stood up to see what was the trouble and then sat down again after the trouble.

Q. You knew where Stroud's seat was at that time, on that day, did you?

A. No sir, I didn't—I didn't see where he was sitting.

Q. Did this occurrence occur to the east and to the front of where Stroud was sitting?

Mr. Robertson: That is objected to as suggesting the answer in the question. I object to that as leading, improper and suggesting to the witness what to say.

Mr. O'Keefe: I desire to finish my question.

The Court: Put it so it will not be subject to objection.

And to this ruling and action of the Court defendant then
556 duly excepted and still excepts.

Q. Where did the stabbing—this affair—occur, was it in front of where Shroud had been seated?

A. Yes, it occurred in front of where he had been seated.

Q. Now, I wish you would step down in front here, if you please, and—say that window there would be about the place that Captain Purcell was seated, and if we get about here—it would be over further to the south—in a position about where these two men were standing at that time——

Q. Yes.

Q. And if we were in such a position, I wish you would take a positon smiliar to the position that Stroud occupied at that time, and put me in the position that the deceased occupied?

A. All right.

Q. Suppose, now, I was in the position in which would be the guard, and that would be to the west of him—now, go ahead and show the jury?

A. When the guard was standing that way, like that, and had the club under his arm, and Stroud was standing like this, and the guard was talking to him, and all of a sudden the guard went to pull his club out from under his arm, like that, and when he did, Stroud grabbed at it with his right hand, like that, and the guard pulled it away, and jerked it away quick, and Stroud grabbed it with both hands, the guard jerked it away again, and Stroud's left hand went to his left side and shot out quick again, and hit him in the chest.

Q. Where was the club, in the deceased's hands at that time?

A. At the time he was hit?

Q. Yes?

A. It was in the air like this, the way you have it, like this—in that position, like that.

Q. And it was at that time that Stroud's hand shot out with the knife, was it?

A. Yes.

557 Q. Now, Mr. Murphy, did you see any other occurrence there in the neighborhood of a month before that, between the guard, the dead man, in this case, and a prisoner?

A. No sir, I didn't see the occurrence, but I knew of it.

Q. What was the name—do you know the name of the man with whom it occurred?

A. No sir, I can't think of his name—he used to cell with me—I don't remember his name.

Q. Did you see where that occurred, in what aisle or whereabouts?

A. Yes sir.

Q. What aisle did that occur in?

A. That occurred in the first aisle.

Q. That would be this aisle?

A. That is the first aisle—and that the first section, to the left.
Q. Whereabouts was it with reference to where Stroud was on this particular day?
A. Well, that was a little further back from where he was sitting.
Q. Back in here?
A. No, up this way further.
Q. Did you see any part of the occurrence?
A. I didn't see the occurrence, no, but I knew there was trouble up in the front, because the line was held up in the back.
Q. Where were you seated on that day?
A. I was seated toward the back of the dining room, on that day.
Q. On the second aisle?
A. On the first section to the left.
Q. This section?
A. No, the other section.
Q. This one?
A. No, over to the left.
Q. This one?
A. Yes.
Q. Like in here?
A. Yes sir.
Q. From your position there you say you could see what occurred up in front?
A. No sir, I could not see what occurred.
Q. Could you see the men between whom it occurred?
A. No sir, I could not see.
558 Q. Or distinguish them afterwards?
A. No sir, I could not. I didn't know who it was until afterwards.
Q. What you learned of that, you learned from others?
A. I learned from others, yes sir.
Q. All you men come in with the same style of clothes, into this room, when you go into the dining room?
A. At all times do you mean?
Q. Take this particular day when this trouble occurred between Stroud and this other man?
A. That particular Sunday, we had on our heavy blue clothes, blue coat and blue pants.
Q. All had on the same clothing—a similar coat and pants, did you?
A. Yes, all first grade men.
Q. Did you ever consider whether a person sitting here could identify a man in one of those lines in any place here?
A. No sir, I never did stop to consider that.
Q. You had been in the penitentiary there how long before this occurred?
A. Well, I came into the penitentiary in November, 1914.
Q. What were you sent there for?
A. White slavery.
Q. Your time will be out when?
A. October 25, 1920.

Q. Before this occurrence, did you know Turner?
A. Well, I didn't know him personally, never spoke to him.
Q. You knew who he was?
A. I knew who he was—knew about him.
Q. Had you heard other prisoners speak of him before that time?
A. Yes sir.
Q. Did you know what his reputation was—that is all—the last question is withdrawn.

Cross-examination.

By Mr. Robertson:

Q. How many sentences did you get, when you came up here to the prison?
A. Three sentences?

559 Mr. Kimbrell: Sentences for what?

Q. White slavery—didn't you get a sentence for one year?
A. Yes.
Q. And a sentence for two years?
A. No sir.
Q. One for eight years?
A. One for eight years.
Q. For dealing in prostitution, didn't you—from Kansas City?
A. No, for white slavery.
Q. You are one of a comparatively small coterie in the prison who are in rebellion against the officers, aren't you, and the discipline of the prison?

Mr. O'Keefe: We object to that as not an impeachment of the witness, not proper cross examination, and not tending to prove or disprove any issue in the case.
The Court The objection is overruled.

And to this ruling and action of the Court defendant then and there excepted and still excepts.

A. What was it you said, now?
Q. You are one, are you not, of the small coterie of fellows—comparatively small bunch of fellows, if you want to use that term, who are in rebellion against the prison?
A. No sir.
Q. You have lost your good time, haven't you?
A. Yes sir.
Q. How many times have you been reprimanded?

Defendant's counsel objected to the question as not impeachment, and not tending to prove or disprove any issue in the case.
The objection was by the Court overruled; and To this ruling and action of the Court, defendant then and there duly excepted and still excepts.

A. I don't know how many times.

560 Q. How many times have you been in solitary confinement up there—in solitary?

Mr. O'Keefe: The same objection.
The Court: Overruled.

And to this ruling and action of the Court, defendant then and there duly excepted, and still excepts.

A. About six times.
Q. Yes—I will ask you if, on the 20th day of January, 1915, you didn't commit an assault in the kitchen of that institution, with a club, upon Number 8316?

Mr. O'Keefe: We make objection to that as not cross examination, and improper.
The Court: Overruled.

And to this ruling and action of the Court defendant then and there excepted, and still excepts.

A. No, I didn't.
Q. You didn't do that? And didn't you have a knife at that time?
A. No.

Mr. O'Keefe: The same objection.

The objection was by the Court overruled, and to this ruling and action of the Court defendant then and there duly excepted and still excepts.

Q. Didn't you lose twenty days' good time right then and there.
A. I lost 15 days' good time.
Q. For what I have called your attention to, didn't you?
A. No.

Mr. O'Keefe: The same objection.
The Court: Overruled.

And to this ruling and action of the Court defendant then and there duly excepted and still excepts.

561 Mr. O'Keefe: I understand exceptions go, without my calling attention to it?
The Court: Yes; enter exceptions to all adverse rulings of the Court without the formality of asking for it.

Q. You know guard Lemmer there, don't you?
A. Yes.
Q. Isn't he the man that dealt with you on that occasion?
A. Not the occasion that you speak of.
Q. What was it—on what occasion did he deal with you?
A. Well, I had a quarrel, but I didn't assault anybody.

Q. Do you remember them finding a dirk knife in a locker in your cell?

A. No.

Mr. O'Keefe: That is objected to on the same grounds as before,
The Court: Overruled.

And to this ruling and action of the Court defendant then and there duly excepted, and still excepts.

Q. You remember of one being found in a locker used by you in the stone shop?

Mr. O'Keefe: The same objection.
The Court: Overruled.

And to this action and ruling of the Court defendant then and there duly excepted and still excepts.

A. Yes.

Q. Were you reprimanded for that by Deputy Warden L. J. Fletcher?

A. I was.

The defendant's counsel made the same objection, which was by the Court overruled, and to this ruling and action of the Court defendant then and there duly excepted, and still excepts.

Q. And about April 27, 1917, did you disobey the orders of your superior, and refuse to work, and were you reprimanded there and put in isolation on a restricted diet and fastened to the cell
562 door?

Mr. O'Keefe: The same objection.
The Court: Overruled.

And to this ruling and action of the Court defendant then and there duly excepted and still excepts.

A. That is right.

Q. That is right—and on May 9, 1917, were you again confined and secured to the cell for refusing to work and placed on restricted diet again, by L. J. Fletcher, Deputy Warden?

Mr. O'Keefe: The same objection.
The Court: Overruled.

And to this ruling and action of the Court defendant then and there duly excepted and still excepts.

A. I don't remember.

Q. Do you say you were not?

A. I don't say I was not, but I don't remember that.

Q. On the 25th day of June, 1917, were you called to account for cursing and using vulgar and indecent language, and reprimanded for that by L. J. Fletcher, Deputy Warden?

Mr. O'Keefe: The same objection.
The Court: Overruled.

And to this ruling and action of the Court defendant then and there duly excepted, and still excepts

A. I don't remember that, either.
Q. You don't remember being called to account and reprimanded cursing and using vulgar and indecent language do you again on August 3rd, 1917?

Mr. O'Keefe: The same objection.
The Court: Overruled.

And to this ruling and action of the Court, defendant then and there duly excepted and still excepts.

563 The Court: You may enter objections to all these questions and answers as to misconduct without any mention.

Q. Do you know guard Reeves?
A. Yes.
Q. Were you reprimanded for calling guard Reeves a foul name, on August 3rd, 1917?
A. I was reprimanded for something—I don't remember what it was.
Q. Didn't you call guard Reeves "a God damn son of a bitch," and weren't you put in on that?
A. No, I didn't.
Q. You deny that?
A. Yes.
Q. And you were put on restricted diet and put in isolation?
A. I was put on restricted diet—I was already in isolation.

The Court (there being some demonstration of amusement in the audience or public part of the Court room): Mr. Marshal, you will escertain what the disturbance is. It is essential that nobody should come into court, and treat it as a matter of levity in a case of this character; and I want the man that is guilty of that kind of conduct brought to the front. Ascertain who it is and I will put a fine upon them.

Q. I will ask you whether, eight days later, upon August 11, 1917, if you were not reprimanded and put on restricted diet, and already being in isolation, for again cursing and using vulgar and obscene language?
A. That was what I was reprimanded for that time, yes sir.
Q. And for villifying officers of the institution, isn't that right?
A. No.
Q. Have you ever seen your report?
A. No, I never see no reports.
564 Q. Have you ever asked to see them?
A. No. They are read off to me.
Q. Was that one read off to you?
A. That one—I don't remember that one very well.

Q. Was that one read off to you?
A. What one?
Q. September 29, for using profane and indecent language on that day—do you know guard Andrews?
A. Guard Andrews?
Q. Yes?
A. Yes, I know guard Andrews.
Q. Were you reprimanded for that conduct on that day, and again put on restricted diet?
A. I was reprimanded, but I don't remember what for.
Q. Now, whenever these matters like this come up, you are given an opportunity to show, a chance to show whether the charge is ture or not, up there?
A. They ask you if it is so.
Q. You are given a chance to show whether it is true?
A. There is never anything to show.
Q. There has not been in your case—and you were already in isolation, weren't you?
A. Yes.
Q. Just last week, you were again reprimanded for misconduct up there?
A. Yes.
Q. You know guard Logan, don't you?
A. Yes.
Q. How many times do you recall that you have been reprimanded for misconduct, up there?
A. Well, I guess you have called off about all of them.
Q. You remember being scored shortly after you came to that institution in December, 1914, about loafing and refusing to work?
A. Yes, I remember that report.
Q. Yes, and you remember the one three days later, December 15th, of disorderly conduct, for which you were reported by guard Layner?
A. No, I can't remember that.
Q. And don't you remember now being reduced right
565 there to second grade, and put in solitary confinement?
A. I was reduced to the second grade and put in solitary confinement the first time I was reported.
Q. You were reduced to second grade and put in solitary confinement in just about a month after you landed in the prison weren't you?
A. I think it was more than a month.
Q. You now say you were able to see Stroud holding the club—now, if Stroud has made a statement in writing and signed his name to the statement, that the guard was stepping away from him—if he has made that kind of statement at the time, they you are mistaken, you must be mistaken, aren't you?

To this question, defendant's counsel objected, and the objection was by the Court sustained.

Q. Do you remember the occasion of talking in a loud and angry voice, talking to guard Lemmer and of using some expression like this, "I don't want you to bawl me out any more" and continuing talking in a loud and angry voice, and you were taken over right there by guard Lemmer to the deputy?

Mr. O'Keefe: That is objected to as repetition—he asked about that before.

The Court: Did you ask about that before?

Mr. Robertson: This is December 15, 1914.

Q. See this, do you remember that?
A. Yes, I remember that.
Q. That is all.

Redirect examination.

By Mr. O'Keefe:

Q. You know you were subpœnaed as a witness for the defendant in this case on the last trial of the case?
A. On the last trial?
Q. Just a year ago?
A. Yes sir.

Mr. Robertson: That raises another question.

Mr. O'Keefe: Go ahead.

566 Recross-examination.

By Mr. Robertson:

Q. You went into the institution in 1914?
A. Yes sir.
Q. When did you learn of Stroud killing Turner?
A. When did I learn of it?
Q. Yes?
A. Why, I learned of it the day it happened.
Q. And have known of it ever since?
A. Certainly—naturally.
Q. And did you testify on this case when the other convicts testified in his, Stroud's behalf?
A. No, I didn't.
Q. You knew the "Count"—the man that was called the "Count" in the prison?
A. Yes, I knew who he was.
Q. You knew he testified?
A. No, I didn't know that?
Q. You knew Ryan?
A. Yes.
Q. You knew he testified?
A. No, I didn't know anything about that.
Q. You knew Stroud was being tried?
A. Yes.

Q. You didn't testify in his behalf, did you?
A. No.

Redirect examination.

By Mr. O'Keefe:

Q. You knew you were subpœnaed in the trial of this case—that is withdrawn—did you know you were wanted by the defense as a witness in the last trial of this case and that you were not here?
A. Yes, I know I was subpœnaed for the last trial.
Q. Did you appear here as a witness?
A. No sir.
Q. Do you know that you were not allowed to come here as a witness?
A. That is what I understood.
Q. Now, you have been arrested and locked up a great many times since then—were you always found guilty every time these arrests were made?
A. Naturally.
Q. Were you guilty or not guilty?
A. Sometimes I was guilty, and then again sometimes I was not.
Q. Were you locked up for those times that you were not guilty?
A. Certainly.
Q. And you have been almost continually under arrest or
567 locked up up there since the last trial of this case?
A. Yes, all the while.
Q. Was there any new charge against you at the prison, any new charge?
A. I don't know.

Mr. O'Keefe: That is all.

(Witness excused.)

CLYDE STRATTON, called as a witness on the part of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Antres:

Q. Please state your full name to the jury?
A. Clyde Stratton.
Q. You are at the present time a convict in the Federal penitentiary here, are you not?
A. Yes.
Q. Mr. Stratton, how often have you been under restraint undergoing punishment?
A. Twice.
Q. That is, you have been in two other, or one other penitentiary?
A. Oh, undergoing punishment—I have been in three others.
Q. And for what have you been sent up?
A. Post Office robbery, and burglary and bank robbery.

Q. Now, during the time that you have been up here at the Federal penitentiary, have you been punished for infraction of the rules?
A. For attempting to escape.
Q. Is that the only punishment you have had for infraction of the rules?
A. One little minor offense—I had a little run in with a guard one day—charged with insolence.
Q. Charged with insolence?
A. Yes.
Q. When did you escape from the Federal penitentiary?
A. March, 1913.
Q. Mr. Stratton, will you talk a little loud, so that this gentleman can hear you?
A. March, 1913, the 21st I think.
568 Q. And where were you apprehended?
A. I was brought to the Federal penitentiary, this time, through Loraine, Ohio.
Q. Who brought you back?
A. Captain Purcell.
Q. Captain John Purcell of the Federal penitentiary?
A. Captain John Purcell and Officer McGrath.
Q. Answer yes or no to this question, the way I ask it; on your way back, state whether or not you had a conversation with Captain Purcell concerning the killing of guard Turner?
A. Yes sir.
Q. Where did that conversation take place, as near as you can remember now?
A. Between Loraine, Ohio, and Chicago, Illinois.
Q. On the train?
A. Yes.
Q. I will ask you to state if Captain Purcell said to you in substance or effect, the following: "I expected Turner to get hurt before he did, because he was getting pretty raw with the club, but I didn't expect Bob to do it, because Bob is a good fellow."?
A. Yes sir.
Q. Mr. Stratton, you talked with myself and in company with these other gentlemen last night at the Federal penitentiary?
A. Yes.
Q. Is that what you told us last night?
A. As near as I can remember, the exact words.

Mr. O'Keefe: That is all.

Cross-examination.

By Mr. Robertson:

Q. How many other prison terms did you say you have had besides this one?
A. Three.
Q. What for?
A. Bank robbery, post office robbery, and burglary.

Q. You are what is commonly called a "yeggman"?
A. I never have been called that to my face.
Q. You are in there now for post office robbery, aren't
569 you?
A. I got convicted of it.
Q. Are you the fellow that crawled out of the sewer up here at the penitentiary some year- ago?
A. I am, yes sir.
Q. Where did you serve these other terms?
A. Joliet, Columbus, Ohio, and Mansfield, Ohio.
Q. Are you the same Stratton that tried to get out up here by having them cover you up with a load of ashes?
A. Yes sir.
Q. Who was with you on that occasion?
A. A fellow by the name of Myers.
Q. Was the two of you getting away in that load of ashes?
A. Attempting to.

Mr. Antres: I object to the part about the man with him.
The Court: Confine it to the witness.

Q. You didn't get away, did you?
A. No.
Q. Captain Purcell brought you back, you say, from Lorain, Ohio?
A. Yes sir.
Q. And between Lorain and Chicago, you had this conversation with him?
A. Yes sir.
Q. What railroad were you traveling over?
A. I am not positive; I think we were on the B. & O., between Lorain and Chicago—I am not positive on that—we left the B. & O. depot.
Q. Where were you when you had this conversation?
A. We talked practically all the way—neither of us slept any, all the way.
Q. Talked all the way about Robert Stroud?
A. Not necessarily about Robert Stroud, no.
Q. What was it, you say, that Captain Purcell said to you?
A. Captain Purcell told me that he expected something to happen to Turner; he had cautioned him several times about being too
raw; that he didn't expect Stroud to do it; that Stroud had
570 always held a good job and was a good fellow.
Q. Where were you sitting in the train when Captain Purcell told you that?
A. I could not say positively, somewhere in the center of the train.
Q. In the day coach or Pullman coach?
A. In a day coach.
Q. What time of the day was it?
A. About 11 o'clock in the morning.
Q. What time did you leave Lorain, Ohio?

A. Left Lorain, Ohio, about 7:30 or eight o'clock the evening before.

Q. What time did you say that this happened?

A. I should judge along about 11 o'clock or 11:30—it is a long time to remember; I didn't expect to be called on to remember.

Q. Do you know Dennis McGrath, in the institution up here?

A. Yes sir—one of the officers.

Q. Wasn't he right there with you?

A. Not all the time, no sir.

Q. Was he there when he made this statement?

A. Not at the time the statement was made to me.

Q. Did he hear you say anything to Captain Purcell about Robert Stroud?

A. He did, yes; he heard my question——

Q. Did he hear——

Mr. Antres: I object—he has not finished his answer.

A. He heard me inquire about Stroud, that started the conversation.

Q. And then did he hear the statement that you say Captain Purcell made?

A. I could not say whether he was right there in the seat at the time that happened or not.

Q. Isn't it a fact that you three all sat together all the way?

A. No, it is not—by no means.

Q. And wasn't Dennis McGrath there as a guard, to assist
571 in seeing that you got back to the Federal penitentiary, and wasn't you wearing handcuffs and had an Oregon boot on?

A. I had—yes they put an Oregon boot on my foot so I could not escape.

Q. You got out of the Joliet penitentiary, didn't you?

A. Yes sir.

Q. You are one of this little coterie up there that is in rebellion against the officials of the penitentiary?

Defendant's counsel objected to the question as not proper cross examination, which objection was by the Court overruled, and to this action and ruling of the Court defendant then and there duly excepted and still excepts.

Q. Isn't that true?

A. Have I ever been disciplined for anything up there except for attempting to escape?

Q. What is the lowest grade of prisoner up there?

A. The third grade.

Q. When were you first reduced to third grade?

A. I could not say exactly when it was—when I made the attempt to get away.

Q. You have lost all your good time, haven't you?

A. I lost that on the 21st of March—when I escaped I forfeited that.

Q. Forfeited every day of it?
A. That was understood.
Q. You remember of violating the rules of the prison about October, 1917, after you were brought back, from Ohio, in attempting to use the privileges of another prisoner, one Charles Smith, in the matter of correspondence?
A. I did, yes.
Q. And you were reprimanded for that?
A. I lost my writing privileges for 60 days.
Q. You were then in isolation, weren't you?
A. Yes.
Q. Are you in isolation there now?
A. And I expect to be there until I leave—until my time is up.
Q. And were there when you were brought back to the prison?
572 A. And was there when I was brought back to the prison.
Q. For that reason there is no object in your trying to obey the rules or being an orderly prisoner?
A. I have been an orderly prisoner, Mr. Robertson.

Mr. Andres: We object to that.
The Court: I think you have about all on this line.
Mr. Robertson: There is considerable more about the prisoner's record.
The Court: The prisoner says he is now in isolation, and will remain there until his term expires, and has forfeited all rights by way of attempting to escape.
Mr. Robertson: There are numerous instances here, but I will waive them.

(Witness excused.)

JOHN DUFFEY, called as a witness on the part of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Andres:

Q. Please state your full name?
A. John Duffey.
Q. Mr. Duffey, at the present time you are in the hospital in the Federal penitentiary, are you not?
A. Yes sir.
Q. Are you ill?
A. No sir.
Q. Have you been sick?
A. Not that I know of.
Q. Do you know why they have you in the hospital?
A. No sir.
Q. Mr. Duffey, will you speak a little louder so that this gentleman up here can hear all that you say—how long have you been in the hospital?

A. I suppose about three weeks.
Q. Is a physician attending you, and has been?
A. He just comes around and asks me how I am feeling.
573 Q. Now, Mr. Duffey, how long have you been in the Federal penitentiary?
A. About thirty-one months.
Q. And what were you sent there for?
A. Interstate commerce.
Q. When you say "interstate commerce," you mean you stole something from a box car or freight car while it was in transit between states?
A. Yes sir.
Q. And how much of a sentence did you get for it?
A. Eight years.
Q. Have you been in any other penitentiary.
A. Yes sir.
Q. How often have you been in the penitentiary?
A. Once.
Q. Once before this time?
A. Yes sir.
Q. In what penitentiary were you confined?
A. Fulsom State prison, California.
Q. What were you in the Fulsom State penitentiary for?
A. Robbery.
Q. Now, since you have been in the Federal penitentiary here, Mr. Duffy, have you been punished for violating the rules of the institution?
A. Yes sir.
Q. Now, about how often have you been punished?
A. Three times.
Q. And, I believe—I have forgotten how long you said you had been in there—31 months?
A. 31 months.
Q. And have been punished three times?
A. Yes sir.
Q. Do you recall for what reason you were punished?
A. Attempt to escape.
Q. Did you attempt to escape three times?
A. Escaped once.
Q. Did you attempt to escape three times?
A. No sir, escaped once and attempted twice.
Q. Are those the only times you have been punished up there for infraction of the rules?
A. Yes sir.
Q. Now, Mr. Duffey, you know Prisoner Stroud, do you not?
A. Yes sir.
Q. And you knew Mr. Turner, the guard, did you not?
574 A. Yes.
Q. You may state whether or not on the 26th day of March, 1916, you were in the dining room in the Federal penitentiary when the killing of guard Turner took effect?

A. Yes sir.

Q. Where were you sitting at that time, with reference to Robert F. Stroud, the defendant?

A. Oh, I should judge about a dozen seats in back of him.

Q. Did you see Robert Stroud when he got up from his seat?

A. Yes sir.

Q. What did he do—(To the jury:) Can you hear?

A Juror: No.

Q. You will have to talk a little louder?

A. Well, Stroud got up out of his seat and walked up the aisle toward the Captain's desk, and he met guard Turner coming down the aisle from the front, and they stopped and started talking, and guard Turner seemed to be getting angry, and the next thing I seen, he reached around with his right hand and took his club out from under his left arm and pulled it up, and Stroud grabbed it and Turner pulled on the club and pulled it out of Stroud's hand, and then he raised it again, and when he raised it Stroud hit him with his left hand.

Q. Mr. Duffey, state whether or not you heard any conversation between guard Turner and Robert F. Stroud, just the moment before you saw Turner reach for his club and pull it up?

A. No sir.

Q. Why didn't you hear it?

A. Because I was too far away.

Q. State whether or not there was any band playing or any other noise in that dining room at that time?

A. Well, I think the band was playing.

Q. In feet, Mr. Duffey, how far would you say you were from the place in the aisle where this conversation took place?

A. From where I was sitting?

Q. Yes?

A. Well, possibly thirty or thirty-five feet.

Q. Why do you say—if I understood you correctly—that
575 the men were engaged in a heated discussion in the aisle?

A. Why, I could tell by guard Turner's expression of his face that he was angry.

Q. Did you discern anything about his mouth, gritting his teeth or otherwise, as he raised his club?

A. I could see his lips moving fast.

Mr. Andres: You may ask.

Cross-examination.

By Mr. Robertson:

Q. You say you have been punished only three times up there?

A. Yes sir.

Q. What was that for, each time?

A. Once for escaping, and twice for attempting to escape.

Q. When was it you escaped?

A. I escaped the 9th of August, 1915.

Q. Do you remember guard Allred?
A. No sir.
Q. Don't remember guard Allred—don't you remember of guard Allred reporting you on May 13, 1916, for having dice in your cell, and that you were found with these in your possession and you said you made them in the stone shop, and you were reprimanded for it?
A. The deputy told me at the time that that was not going against me.
Q. You were reprimanded for it, weren't you?
A. I believe I did lose two Sundays' privilege.
Q. You remember on July 20 of being reprimanded for disorderly conduct which consisted of your stopping prisoner No. 9100 (indistinctly heard) that was a waiter in the dining room and talking to him during breakfast in the morning and interfering with the report being made by guard Stewart?

Mr. Kimbrell: We object to that for the reason it does not tend to reflect upon the credibility of the witness; a mere infrac-
576 tion of a rule like that don't go to the man's discredit; for that reason we object to it.

The Court: I think it has some bearing toward the attitude of the witness toward the officers or institution as to whether or not he had been guilty of violation of the rules of the institution. The jury have a right to know that in order to determine what weight to give his evidence.

And to this ruling and action of the Court, defendant then and there duly excepted and still excepts.

A. I don't remember that.
Q. Don't you know—don't you remember on account of that you were caused to lose your base ball privilege and your yard privilege?
A. I do not.
Q. Do you deny that?
A. I don't deny it, I don't remember.
Q. You remember about April 27, 1917, of a dangerous dirk knife being found in a locker that you used in the stone shop?
A. There is a man getting punished for that in the isolation right now, in the isolation.
Q. You remember that?
A. I had nothing to do with that.
Q. Weren't you reprimanded for that and changed from tool sharpening to cutting stone?
A. It was not for that I got reprimanded.
Q. Is not that so?
A. It is not so.
Q. You say the dagger was not found in that locker?
A. The locker didn't belong to me.
Q. Was the dagger found in the locker?
A. I don't know.

Mr. Andres: That is objected to for the reason that it is
577 not shown that it was in the exclusive control of the witness.

The Court: The witness says that he had no control over that.
Mr. Robertson: We will pass that.

Q. You remember the occurrence on June 8, 1917, of attacking a guard with a knife?
A. I never attacked no guard with a knife.
Q. Weren't you on that account segregated indefinitely?
A. I was segregated but innocent.
Q. You were segregated, but innocent?
A. Yes sir.
Q. Yes—you have lost all your good time, hav- you not?
A. Yes sir.
Q. And you are in third grade, aren't you?
A. Yes sir.
Q. And you have no privileges?
A. None whatever.

Mr. Robertson: That is all.

Redirect examination.

By Mr. Andres:

A. I just want to ask you a question, Mr. Duffey—were you present at the time that you were charged and being tried for having attacked a guard with a knife?
A. Was I present?
Q. Yes, and did you hear the guard testify against you?
A. No sir.
Q. To refresh your recollection, didn't the very guard that you were supposed to have attacked with a knife state that he didn't know whether you were the one who did it or not—do you remember anything of that kind?
A. Well, he has never told me that.

(Witness excused.)

Miss ELIZABETH LA BAR, called as a witness on the part of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Kimbrell:

Q. State to the jury your name, please?
A. Elizabeth La Bar.
578 Q. And what official position do you hold in connection with the Court here?
A. I am secretary to Judge Pollock, and Court Reporter.
Q. Were you present in court during the first trial of this case, in May, 1916? when Judge John C. Pollock presided?
A. I was during a part of that trial.
Q. Did you report a part of the testimony in that case?

A. I did, a part of it.
Q. Did you report the testimony of guard Whitlatch?
A. I would not be able to say without referring to my record.
Q. Well, please examine the bill of exceptions—you made up the bill of exceptions when that case was appealed to the Court of Appeals, at St. Louis, didn't you?
A. I made up the testimony of certain witnesses who testified the first day, and the charge of the Court delivered at the close of the trial.
Q. Will you examine this and see if you made up the record of the testimony of guard Whitlatch?

Mr. O'Donnell: Page 18, Miss La Bar.

A. This is my transcript right here.
Q. And you have had considerable experience in reporting, have you not?
A. Yes, I have.
Q. And will you tell the jury whether you accurately reported the testimony of guard Whitlatch?
A. I endeavored to do so, to the very best of my ability.
Q. And did you correctly transcribe his notes?
A. I did.
Q. The notes?
A. I did.
Q. And is this the transcript of the testimony?
A. That is my transcript.
Q. And in your judgment is that correct?
A. It is.
Q. Please let me read from this—I want to ask you now if the following question was asked E. Whitlatch, guard, and the
579 answer made which I shall read: "Question (by Mr. Robertson): Explain briefly to the jury what you saw and heard Answer: I was detained in the dining room on this day as a guard. I was in the aisle with guard Turner in the rear of him. I marched to the rear end of the aisle, and turned around and saw prisoner Shroud and guard Turner standing talking. I started to move up the aisle and I saw Stroud grab for Turner's club. When I got nearly up to them, within 20 feet of them, I saw Turner raise his hand and motion to the Captain and guard Turner fell on the floor, and the prisoner faced the Captain and stood there until the Captain came up to him."—was that question propounded to guard Whitlatch and did he make that answer?
A. I have no definite recollection, but as it is there in the record, I would say, Yes.
Q. You know General L. C. Boyle, do you?
A. Very well.
Q. You remember that he appeared for Mr. Stroud——

Mr. Robertson: I suggest that you just introduce the transcript, if you want to; I have no objection to it.

Q. I want to ask you if you recall this question and if guard Whitlatch made this answer: "Question: The first you observed, as I get you, as I understand you, if I am wrong you correct me, the first movement you saw between them was Stroud ahold of Mr. Turner's club? Answer: Grabbed for it. Question: Grabbed for it. And where was the club then? Answer: Turner had started to take the club from under his left arm. Question: With his right hand? Answer: Yes sir."—now, were those questions asked on the cross examination and those answers made, in your best judgment?

A. They were.

Q. Were you present in court when guard Whitlatch was on the stand at the second trial of the case?

A. If he was on the stand—and I think he was—I was
580 present, because I was present right through all of the trial.

Q. Do you recall that I repeated those questions to him and later put you on the stand in regard to the same matter?

A. I think I was on the stand in reference to this same matter.

Q. Then, to refresh your recollection, I will ask you if guard Whitlatch did not then deny that he made such answers—you will recall that he swore that he did not answer that way?

A. I possibly would recall at that time that he did so, but I don't recall now, what his testimony was.

Mr. Kimbrell: That is all.

Mr. Robertson: We desire to offer as a part cross examination of this witness, the entire transcript that counsel has referred to, the record counsel has read from, taken at the first trial, so that the jury will have the benefit of the entire connection.

Mr. Kimbrell: We object that the only part that is competent is that part, that question and the answer the guard made and which he denied that he made.

The Court: I think counsel had better point out the particular part of the former testimony bearing upon this matter, if he wants any of it offered.

Mr. Robertson: His testimony deals with nothing else, your Honor, but that main occurrence, in any portion of it.

The Court: If you want me to rule on this objection, I cannot do it without reading all of this testimony.

Mr. Robertson: It is not very long—it is very brief.

581 The Court: Let me see it. (After examining Bill of Exceptions on file.) There are some statements by the witness directly on that same subject, that I think would be competent; a great deal of it, I think is not competent. I don't know just what part it was you read—it is not marked.

Mr. Kimbrell: That part wherein he describes the grabbing at the club; we offer that for the purpose of impeaching him, for the reason that at the second trial he denied having made it—we used Miss La Barr to show that he did make it.

The Court: There are some more statements made by the witness in the same examination with reference to the club.

Mr. Kimbrell: Yes sir.

The Court: I think it is competent to put those in, if the counsel desires to do so. I have marked the parts on the first page, in brackets that I think are competent—at the bottom of the page.

Mr. Robertson: We desire to offer in evidence that portion of the transcript of the evidence of E. E. Whitlatch marked by brackets, which transcript appears in the bill of exceptions filed in this case by the Clerk of this Court, June 29, 1916. I now desire to read it to the jury.

The parts of the bill of exceptions referred to by Mr. Robertson in his offer, were received in evidence, and read by Mr. Robertson to the jury, as follows:

582

"Question: Explain briefly to the jury what you saw and heard? Answer: I was detailed in the dining room on this day as a guard. I was in the aisle with guard Turner in the rear of him.

The Court: I don't recall marking that. I put in brackets in lead-pencil what I thought was competent.

Mr. Robertson: On page 15 at the bottom of the page.

The Court: You want to offer that part?

Mr. Robertson: Yes.

Mr. Robertson then continued reading as follows:

"I was in the aisle with guard Turner in the rear of him. I marched to the rear end of the aisle, and turned around and saw prisoner Stroud and guard Turner standing talking. I started to move up the aisle and I saw Stroud grab for Turner's club. When I got nearly up to them, within 20 feet of them, I saw Turner raise his hand and motion to the Captain and stood there until the Captain came up to him."

Mr. Robertson: The question was asked by me; and in the next statement marked here, it is a question asked by Mr. Boyle in cross-examination:

Mr. Robertson then continued reading as follows:

"Question: The first you observed, as I get you, as I understand you, if I am wrong you correct me, the first movement you saw between them was Stroud ahold of Mr. Turner's club? Answer: Grabbed for it. Question: Grabbed for it. And where was the club then? Answer: Turner had started to take the club from under his left arm."

583

Mr. Robertson: The next that your honor has marked is also in cross-examination by Mr. Boyle, and is as follows:

Mr. Robertson then continued reading, as follows:

"Question: And you saw this man grab at the club? Answer: Yes sir. Question: And then you saw Turner wave to the Captain? Answer: Yes. Question: Did you hasten down there then? Answer: As fast as I could."

Mr. Robertson: That is all.

Mr .Kimbrell: Now Miss La Bar, I must trouble you again.

Mr. Robertson: Miss La Bar, can you take your own testimony?
Miss La Bar: Not very well.

Direct examination (of Miss La Bar) continued.

By Mr. Kimbrell:

Q. Pardon me just a moment—part of this index has been mislaid in this transcript, or has been torn out. Do you recall a witness named Howard Beck testifying in the case, Miss La Bar?
A. I can't say that I could testify positively that I remember the witness Howard Beck.
Q. You would not recall without an examination of the notes?
A. No, I would not.

Mr. Kimbrell: If the Court please, there is just half of this index remaining in this record that has been on file here in the court. I am not able to turn right now to this testimony which I read to the jury yesterday from this; and I will put this over until tomorrow morning.
584 Mr. Robertson: Here is what you want.
The Court: We will adjourn now until 9.30 tomorrow morning.

And thereupon the Court took a recess until 9:30 o'clock on the following morning (being June 27, 1918) at which day and hour the court re-convened, the trial of this cause was resumed, and the following proceedings were had:

Mr. Kimbrell: Will you please take the stand, Miss La Bar?

Miss ELIZABETH LA BAR recalled for further examination on the part of the defendant, testified as follows:

Direct examination.

By Mr. Kimbrell:

Q. Miss La Bar, did you state yesterday afternoon you reported the testimony of Howard Beck at the first trial?
A. I think I stated yesterday that I could not remember without reference to the record.
Q. Now, have you examined the record?
A. Yes sir.
Q. Did you report it in shorthand?
A. Yes sir.
Q. Did you transcribe it?
A. Yes.
Q. Are these the transcript of your notes, page 40 of the bill of exceptions?
A. They are.
Q. Let me ask you again, please—I want to ask you if these ques-

tions were asked guard Beck, and these answers given on direct examination—questions by Mr. Robertson: "Question: What is your name? Answer: Howard Beck. Question: Are you a guard in the prison? Answer: Yes sir. Question: Were you a guard in the Federal prison on the 26th day of March of this year? Answer: Yes sir. Question: Did you see the occurrence in the dining room between defendant Stroud and guard Turner on that day? Answer:
585 Just a little of it. Question: Just a little of it. Just tell the jury what you saw and heard? Answer: Well, I was walking down the north aisle, down toward the kitchen door, and as I got to the kitchen door, I turned around and the men in the aisle were standing up, and I cast my eyes toward the south and I seen Mr. Turner and Mr. Stroud standing together, so I walked right up back the aisle to quiet down the men and I glanced over again and seen Mr. Stroud standing there with his hand holding a stick, and I kept right on going to quiet the men down. Question: Just explain what you noticed about the club as between Stroud and Turner. Answer: Well, I looked over, and Turner was facing kind of this way, toward the aisle, and Stroud was facing this way; and it looked to me where I stood that he had both hands on it. Question: Now, as you remember the occasion, when did that happen in relation to the guard sinking to the floor? Answer: Well, that was before. Question: How long before? Answer: I couldn't judge. Just as I got about half way up the aisle and looked up again he was reeling over"—were those questions asked Mr. Beck, and did he make those answers at the first trial?

A. From the fact that they are there in the record, it is my belief he did; I have no personal recollection except as it is in the record, with respect to his testimony.

Q. It is your best knowledge that he did, because you took it in shorthand and transcribed your notes, and this is a transcript of your shorthand notes?

A. Yes sir.

Q. That is true?

A. Yes.

(Witness Excused)

Mrs. ELIZABETH J. STROUD, called as a witness on the part of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Kimbrell:

586 Q. Speak so these gentlemen over here can hear you—what is your name?

A. Elizabeth J. Stroud.

Q. Where is your home?

A. At the present time?

Q. No, permanent home?

A. My home is Juneau, Alaska.
Q. How old are you?
A. Fifty eight years old.
Q. How many children have you?
A. Four.
Q. You have been married twice?
A. Yes sir.
Q. How many children by your former husband, first husband?
A. Two daughters by the first marriage.
Q. Two boys by your husband, Stroud?
A. By the second marriage.
Q. How are you related to the defendant?
A. His mother.
Q. What is the name of your second boy?
A. Marcus.
Q. How old was he at the time of the killing of guard Turner by your son Robert?
A. Eighteen.
Q. What time did he leave your home in the northwest, Alaska, for his trip south, just prior to the killing of guard Turner?
A. I could not state the date—the fore part of March, 1916; he stopped in Seattle, in route.
Q. You know nothing about his visiting Robert except by hearsay?
A. Only what he wrote me.
Q. After you heard of his killing of guard Turner, did you come to Leavenworth?
A. I did.
Q. What time did you arrive here?
A. If I am not mistaken, I think it was the 6th day of April, 1916.
Q. How old was your son Robert, at that time?
A. Twenty-six.
Q. Describe the condition of health in which you found him?
A. For over a year he had been writing about his poor health.
Q. Well, you should not state hearsay matters—just state his condition of health as he appeared to you, when you got here?
A. Well, when I arrived here, I was shocked at his physical
587 appearance. I found him emaciated and apparently in very poor health.
Q. What was the matter with him?
A. Dr. Yohe told me it was Bright's disease.
Q. Was he under treatment at that time, so far as you know?
A. Yes sir, I think so.

Mr. Kimbrell: I think that is all.

Cross-examination.

By Mr. Robertson:

Q. Mrs. Stroud, did you hear the evidence of Dr. Yohe, yesterday, that your son was not under his treatment after August 15, 1915?

Mr. Kimbrell: That is objected to.
The Court: Objection sustained.

Q. You testified on the first trial here?
A. Yes sir.
Q. Did you give any of this testimony that you have given now, on that trial?

Mr. Kimbrell: That is objected to.
The Court: Sustained.

(Witness Excused.)

WILLIAM WALLACE, called as a witness on the part of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Antres:

Q. You may state your full name to the jury?
A. William Wallace is my name.
Q. Mr. Wallace, at the present time you are a prisoner at the Federal penitentiary at Leavenworth?
A. Yes sir.
Q. How long have you been up there?
A. Since March 18, 1915.
Q. Mr. Wallace, for what crime are you being punished at the present time?
A. Counterfeiting gold coin.
Q. Were you ever in any other penitentiary?
A. Yes sir.
588 Q. How many times have you been in the penitentiary?
A. This is my first term in a Federal prison.
Q. In a State prison?
A. I have been in three.
Q. Besides the Federal?
A. Yes sir.
Q. So that you have been in four times?
A. Four times, yes sir.
Q. Do you mind naming the crimes for which you were sent up?
A. I was sent up twice guilty and twice innocent. The first time I went up I was about 16 years old, at Fort Madison, Iowa. The second time I was accused of robbery, in Oklahoma, and while I was in jail for robbery I escaped from jail, and was re-arrested and vindicated of the robbery charge, and then was given fifteen months in Lansing for breaking out of jail. The last time, out in Arizona, I was innocent; I served twenty months.
Q. Mr. Wallace, since you have been such prisoner out at the Federal penitentiary, state whether or not you have held any kind of clerical position?
A. I have held a clerical position almost exclusively the first three

years I was in the prison. I held a clerical position almost all the time.

Q. What position did you hold?

A. Book keeper.

Q. What official did you work under?

A. The last year I was in the office I worked for the record clerk, Mr. Reno.

Q. He was formerly deputy warden there?

A. Yes sir, Mr. Reno was formerly deputy warden ahead of Mr. Fletcher.

Q. When you speak of the record, what do you mean?

A. He is special agent for the department of justice and also custodian of the records of the institution.

Q. The record—that is the place where they keep the photographs and the general record of all the inmates of the Federal penitentiary?

A. Yes sir, and all that ever have been.

589 Q. And you were employed in that department?

A. I was continuously for a year.

Q. Were you ever employed in the laundry up there?

A. I worked in the laundry up there a short time—yes sir.

Q. How long did you work in the laundry?

A. I really don't know—just a few months.

Q. Have you, since you have been incarcerated in the Federal penitentiary been punished for infraction of the rules of the institution up there?

A. Not until very recently.

Q. How long were you working in these various clerical positions at the Federal penitentiary before you were finally punished for an infraction of the rules up there?

A. Just about three even years.

Q. And you were sort of a foreman in the laundry department were you?

A. No, I was not a foreman—I was kind of a head prisoner in there for a while.

Q. An overseer—something of that kind?

A. No, I was rather an able man for the foreman, when he wanted something done quickly and efficiently, he called for one or several men that he named.

Q. At present you are undergoing some kind of punishment up there?

A. Yes sir, I am suspended to the cell door at the present time, during the day time, because I wrote and circulated certain magazine articles, sent them out, without the permission of the warden.

Q. Since you have been in the Federal penitentiary this last time there, have you learned stenography, since you have been in the Federal penitentiary?

A. Largely—I began in the Arizona prison.

Q. Mr. Wallace, while you have been there, did you meet guard Turner?

A. Yes sir.

—. How did you meet him?

A. He was my immediate officer

590 Q. How long did you work with Mr. Turner?

A. A period of several months—I don't know just how long. The records will show.

Q. Did you—do you recall having any talk whatever with Mr. Turner, guard Turner, concerning the defendant in this case, Robert F. Stroud? If so, you may state when that conversation occurred and the nature of the conversation?

A. Why, I don't remember that I ever had any words with him about Turner, or Stroud only on one occasion.

Q. That time, when was that?

A. That was—well, I am not sure—it was the second day before Mr. Turner was killed, that would make it March 24, 1916.

Q. Where were you when this conversation took place?

A. Well, the main laundry proper is one room and the bath room that is another and they are separated by an arched place of communication, and Mr. Turner had a chair up there right in that archway so that he could look into either room at will. I was working and he was sitting in the chair and staring rather intently out toward where a number of prisoners were bathing, out in the bath room——

Q. Just let me interrupt you—was Stroud one of the men that was bathing?

A. I don't know that he was; I didn't see Stroud, and I don't know that he was one. I walked up to Mr. Turner——

Q. You may continue?

A. I walked up to Mr. Turner—I was accustomed to be jocular with him, that is in a limited way—a prisoner never is very free with the officers up there—and I said, "What have you on your mind this morning?" He said, 'I was just watching that Stroud out there' and then, after an appreciable pause, not much of a pause, he says 'If that fellow ever makes a break at me, I will club his brains out.' "

Q. That is all that he said at that time?

A. Yes, I was interrupted then, I had some work to do, and that ended the conversation.

591 Q. Now, what do you know about Mr. Turner's reputation there among the prisoners for being severe, unduly severe, brutal—or rigorous—with the men?

A. Well, now, as to his reputation, among the prisoners, I know little, because I rarely talked to any of the prisoners, and about all I know of Mr. Turner I observed in him.

Q. How is that?

A. About all I know about Mr. Turner, I observed in him personally.

Q. Did you ever have any talk with him——

A. Yes; from remarks—I can't recall just verbatim what they were—but I did gather that his idea of running the laundry was not invoking the proper authority to discipline a prisoner, but to dis-

cipline him personally; he believed—I think he believed in coming into personal contact with the men as the man's disciplinarian. He loved the physical contacts, I believe, and he wanted to go up to a man and discipline him personally.

Q. State whether or not he ever spoke to you concerning his physical ability and development?

A. Not to me personally; I have often observed him in conversation throw out his chest and tell the boys how strong he was and flex his muscles.

Q. He was a well developed man?

A. Yes, he was a gigantic man—he would weigh—I think he weighed more than 200 pounds, and it was all bone and muscle.

Q. In size, Mr. Wallace, how would he compare with Warden Morgan, as to size and development?

A. Well, Warden Morgan is short and heavy; Turner, while probably not any heavier than Mr. Morgan—perhaps a little heavier—Turner was tall enough and sym-etrical enough to be rangy and active. Mr. Morgan, I would say is not a very active man. Mr. Turner was active; he was agile as well as strong.

592 Cross-examination.

By Mr. Robertson:

Q. He would weigh more than 200 pounds?

A. I think so.

Q. Almost gigantic in size and strength?

A. Almost—above the average.

Q. You are sure you have seen him, are you?

A. I worked under him for months.

Q. You were very intimate?

A. No sir, not at all; I dont' permit myself to get intimate, familiar with a guard, it is an infraction of the rules.

Q. You never permit yourself to do that?

A. It is a petty infraction of the rules and I never did break one unnecessarily.

Q. You confess here that you are now chained to the cell door, under restricted diet?

A. No sir.

Q. What did you say?

A. I am chained to the cell door, but I am given any meals I want. I only eat one meal a day—I have not asked for more.

Q. On the 18th of this month, did you refuse to your superior to work up there?

A. I did not. I told him I was unable to work.

Q. And how about on the morning of the 25th of this month—that is Tuesday of this week?

A. I had then been seven days in a stone—bare stone cell, sleeping on a board and eating a piece of bread once a day—seven whole days and nights.

Q. You had previously been in isolation, over in the isolation ward?

A. Previously, but not the Monday.

Q. Previously you had been in isolation, but you were not in isolation on the 25th, were you?

A. Eighteen and seven would be the twenty-fifth—I was let out on the morning of the 25th and it was on the 26th, what you are talking about occurred on the 26th. What day was last Monday?

593 Q. The 24th?

A. On the evening of the 24th I was let out.

Q. Then on the morning of the 25th, you said to the guard; "I will be damned if I will work," or words to that effect?

A. I did not speak to the guard—I just shook my head.

Q. You didn't work?

A. I was unable to—yes sir.

Q. And that is what it was for that you are chained to the cell door?

A. Yes.

Q. The truth of the matter is that you wanted to get marked "incorrigible" so that you could get back in the isolation so that you could talk to Stroud about this case?

A. No sir, the truth is I was sick and I am still sick.

Q. You remember on the 29th of May, 1917, of being reprimanded and your yard and amusement privileges taken from you?

A. Yes sir.

Q. What was that for?

A. For protesting against the Warden's confiscating and retaining all my mail, contrary to the United States postal laws and regulations.

Q. Yes—it was for loud boisterous profane talk, wasn't it, toward the officers of the institution?

A. No sir.

Q. When you went into that institution you knew what the rules were, didn't you?

A. Yes sir.

Q. And you signed an agreement according to the regular course that the prison officials should have supervision of all your mail?

A. To open and and inspect it—not distroy it.

Q. How many times have you been reprimanded at that institution?

A. Very few times—I don't recall now but twice, two times.

Q. Do you remember fighting with 9189?

A. Oh, yes; I had forgotten for the time.

Q. You were reprimanded and put in isolation on restricted diet for that?

A. Yes, that was very recently.

594 Q. That was on the 29th of April of this year?

(Answer indistinguishable by the reporter.)

Q. You are one of the small crowd led by Stroud, that is in rebellion against the authorities of the institution, aren't you?

Defendant's counsel objected to the question in so far as it applied to the defendant. The objection was by the Court sustained.

Q. Are you William James?
A. That was my name in the Arizona prison—my right name is William Wallace.
Q. Who is William H. Wallace?
A. They inserted the "H" contrary to my wish, or by some confusion.
Q. You are also known as William L. Shaw?
A. No, that detective in Denver invented that for me.
Q. Who invented William H. Von Richie?
A. I used that—I invented that.
Q. You used that there?
A. Yes sir.

(Witness excused.)

LEE O'DELL, called as a witness on the part of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Andres:

Q. You may face the jury and state your full name?
A. Lee O'Dell.
Q. Mr. O'Dell, talk out loud so that this gentleman way back here can hear it—you are at the present time a prisoner in the Federal penitentiary up here, are you not, Mr. O'Dell?
A. Yes sir.
Q. How long have you been up there?
A. Three years and four months and a few days.
Q. What were you sent up for?
A. Counterfeiting.
595 Q. When will your time be out?
A. October 13, 1918, I would get away if I don't lose any good time—with good time allowance off, I will be released October 13, 1918.
Q. Have you ever been in any other penitentiary?
A. No.
Q. This is your first offense?
A. This is my first offense—yes sir.
Q. Are you undergoing punishment at the prison at this time?
A. No sir.
Q. What department are you in?
A. At the present time?
Q. Yes?
A. Working in the record clerk's office about two weeks, in the postal room—just went in a short time ago.
Q. Have you ever worked in the kitchen?
A. Yes sir.

Q. Were you ever a waiter?
A. No sir.
Q. Ever have anything to do with the dining room and kitchen?
Q. I was orderly in the chapel, and my duty at that time was to count the men as they walked in to their meals.
Q. How long did you work in the chapel?
A. I am not positive; about six months—something like that.
Q. How long did you continue to count the men when they were marching into the dining room?
A. Until they were all seated.
Q. How long, I mean, did you continue to do that work in the prison?
A. All the time I was working in the chapel.
Q. How long was that?
A. About six months.
Q. Do you recall March 26, 1916?
A. Yes sir.
Q. What occurred on that day?
A. That is the day Mr. Turner was murdered.
Q. Did you know guard Whitlatch?
A. Yes sir.
Q. Did you see guard Whitlatch on that day?
A. I don't remember seeing him, no sir.
Q. When Mr. Stroud and Mr. Turner had that altercation, down there, where were you?
A. I was standing in the door way, leading into the kit-
596 chen, directly behind the band.

Miss La Bar: Where?

A. Behind the band.
Q. Will you step down here Mr. O'Dell; now here is what represents Captain Purcell's station——

Mr. Kimbrell: I don't see how it is possible for some of the jurors to see.

Q. Now you point, assuming that this shows—if this picture was laid down like that, this to your back would be to the east there—now we will say that this is the right of Captain Purcell—now where would the kitchen be with reference to that?
A. Over in here—there is the entrance—the entrance would range from here to over in here.
Q. Now, Mr. O'Dell, where were you when you saw Mr. Turner fall?
A. I didn't see him fall.
Q. Did you see any part of it at all?
A. None of it whatever, only they carrying him out.
Q. Where were you then?
A. I was standing in the door, when they were carrying him out. Mr. — told me to come and get a mop and mop up the blood on the floor.
Q. Point in the picture to where you saw the blood?

A. Beginning at the entrance here, from the entrance going up the aisle. I did this mop-ing at the door, and a lot of blood down past here.

Q. It was blood that had dropped on the floor?

A. Yes sir, blood along the floor and in a pool.

Q. Did you know guard Turner?

A. Yes sir.

Q. State whether or not he was ever in trouble while you were there?

A. He came through the chapel on numerous occasions—occasions—yes.

597 Q. Do you recall an occasion when one of the prisoners up there was either knocked down with a club or some guard's fist?

A. I witnessed that incident, yes; I am not positive whether Mr. Turner struck the man with his club or with his fist. I seen the fellow fall.

Q. Where did that take place?

A. Directly opposite Captain John's station.

Q. When you say "Captain John" who do you mean?

A. Captain Purcell—Captain John Purcell.

Q. Do you know what the name of the prisoner was that he knocked down?

A. No, I don't know his name.

Q. When was that?

A. That was during the latter part of 1915 or early part of 1916—I don't know—I am not positive as to the time.

Q. Do you know what the prisoner had done to occasion the guard Turner knocking him down?

A. I know what the prisoner told me—yes.

Mr. Robertson: We object to counsel assuming a state of facts not in evidence, and second, to the answer because it is evidently hearsay.

The Court: The witness has not stated what it was. As he knows only what the prisoner told him, that is not proper, of course.

Mr. Antres: Your honor sustained the objection to that?

The Court: Yes, it is hearsay.

Q. Did you hear any conversation between Mr. Turner and guard and the prisoner at that time?

A. No sir, I could not understand the conversation: I know they talked but I could not understand the conversation.

Q. What if any incident occurred just before the prisoner
598 was knocked down by guard Turner?

A. I know only what the prisoner told me, that guard Turner had reported him——

Mr. Robertson: We object to that—what the prisoner told him, and also the assumption that the prisoner was knocked down.

The Court: Sustained as to what he was told.

Q. Did you see any altercation——

The Court: I don't understand the witness to have so far said that the prisoner was knocked down?

Mr. Atres: He said he was knocked down——

Mr. Robertson: He never has said that.

Mr. Antres: Pardon me, Mr. Robertson, I am addressing the court. The witness said the prisoner was knocked down by guard Turner and he didn't know whether he knocked him down with his club or with his fist.

The Court: That raises the inquiry, if the witness says that he was knocked down and yet says that he don't know whether he was knocked down with his club or fist, whether he saw anybody knocked down at all or whether he is not partially telling what he understood from others or what he concluded from the situation.

And to this ruling and action of the Court, defendant then and there duly excepted and still excepts.

Q. Now, Mr. O'Dell, there seems to be some question as to whether you saw guard Turner knock the man down. You state what you saw on the occasion there, in the latter part of 1915, or the early part of 1916, about a prisoner being knocked down in the dining room there?

599 A. The line was marching out from breakfast, and the party that was struck was at the front end of the line, and Captain Purcell was standing on the line as it marched out. As this fellow was passing Captain Purcell he stepped out of the line and stated his case to Captain John, Captain Purcell, about Turner reporting him; the man was standing talking to Captain Purcell when Turner walked up, and I was standing in the door; I saw Turner swing at the man—I don't know whether he hit him with his club or with his fist—I knew guard Turner hit him in the face. The fellow made no attempt to fight Mr. Turner, made no attempt to protect himself from injury by Mr. Turner there. He fell to the floor and Mr. Turner and Mr. Rowe took the fellow over to the isolation. Mr. Turner and Mr. Rowe taken the man over to the isolation. What caused a little, quite a little comment by the prisoners about that, and they wondered at it, was that Mr. Purcell was present at the time——

Mr. Robertson: Never mind about the comment.

Q. Did you hear the prisoner's complaint to Captain Purcell?

A. I could not understand the conversation, no. The prisoner told me afterwards that he was complaining when Turner struck him. I could not understand the conversation; when Turner struck him, I was not near enough.

Q. Do you know the proper officer to whom the prisoners up there are to lodge their complaints concerning the conduct of guards toward them?

A. Yes sir.

Q. Who is that individual?

A. To the Deputy Warden.

Q. What does the captain have to do with it, if anything?

A. Well, complaints could be lodged against the guard, with him, I suppose, but it was usually done to the Deputy Warden. I suppose in a case of that kind the Deputy Warden would be a higher authority than the captain would, but the captain can straighten the
600 affair out if he wants to, I suppose.

Q. Do you know of any other instance in which guard Turner attempted to demonstrate upon—corporally or otherwise—any prisoner?

A. Not by violence, no. I have known cases where he would persecute different prisoners.

Q. Did you ever have any trouble with Turner, yourself?

A. No sir, none whatever.

Q. Have you ever been punished for the infraction of any of the prison rules up there?

A. Yes sir.

Q. How often?

A. Why, I was punished, I believe, on two occasions.

Q. For what?

A. One occasion was a prisoner escaped, and when he came back he had some money, and the deputy warden asked him where he got the money, and he told the deputy warden that one of the guards out on the door told him to give the money in to me, and he took the money and escaped—he reported that to the deputy warden, and I was called in and denied it, but I was punished for that.

Q. For what else were you punished?

A. Another prisoner was caught immediately after this with some money in his posses-ion, and he was called in and asked where he got the money, and he told them from me, and I was punished for that.

Q. Were you ever punished for any other offense?

A. I don't believe so; I don't remember if I was.

Q. You are in isolation?

A. No.

Q. Do you know what the general reputation of guard Turner was on and prior to the 26th day of March, 1911, among the prisoners at the Federal penitentiary at Leavenworth, as to being an extreely erascible, excitable, severe, cruel guard?

A. Mr. Turner was a man that was both——

Q. Just answer yes or no—do you know what his reputation was?
601 A. I do.

Q. State whether it was good or bad?

A. It was bad.

Q. Did you at any time prior to the 26th day of March, 1916, have any talk with guard Turner concerning his physical development and ability—Mr. O'Dell, what do you say concerning—I did ask you a question but I will withdraw it and ask you later; what do you know concerning the physical development of Mr. Turner?

A. Mr. Turner was a big stout man—I presume a healthy fellow.

Q. State whether or not you have ever had any talk with him concerning his physical development, his strength?
A. No, I did not.
Q. Now, what do you know of any other instance where guard Turner had any other trouble with any other prisoner, such as you have related in and close to the dining room?
A. No, not any, outside of reporting men.
Q. In other words, you never saw him pick up anybody and carry them out of the dining room?
A. No sir.

Mr. Andres: That is all.

Cross-examination.

By Mr. Robertson:

Q. I will ask you, besides these cases you have spoken of, when you were reprimanded, if you have not also been reprimanded for smoking cigaret-s in violation of the law of the prison, during working hours?
A. I have been reprimanded for it, but never punished for that.
Q. Don't you remember of having a lot of forbidden articles in your cell, such as a lot of envelopes, paper and stamps, and things of that sort?
A. Yes sir, but I don't believe I was punished.
Q. Wasn't you put in isolation for that, and punished, and reduced to second grade?
A. I supposed I was put in isolation for being supposed to
602 give the prisoners that money.
Q. You were put in isolation, weren't you?
A. Yes sir.
Q. On both occasions?
A. Yes sir.
Q. Are you the fellow that is known as the "handcuff king"?
A. Yes sir.
Q. Now, let me understand you; you say that guard Turner knocked a man down with his club in the presence of guard Rowe and Captain Purcell, did you?
A. No, I said I didn't know whether he hi*m* him with his club or his fist, which he hit him with one or the other.
Q. And you saw it?
A. Yes.
Q. Where did this happen?
A. In the dining room, near Captain Purcell's station.
Q. And when did it happen?
A. I don't remember the date.
Q. Well, about when—what year?
A. The latter part of 1915 or early part of 1916, I am not positive.
Q. What other guard or officer of the prison saw this affair, besides Rowe—Mr. Rowe and Captain John?
A. I don't know that there was any.

Q. Are you also known as Julia Lee?
A. Yes sir.
Q. Did you testify at the first trial of this case?
A. No sir.
Q. Were you in the prison at that time?
A. Yes sir.
Q. Turner had a bad reputation among the men, had he?
A. Yes sir.
Q. Who did you hear say that he had a bad reputation?
A. I don't think there was a man in the prison would say he didn't have—that would speak a good word for him.
Q. You know Clyde Stratton, up there, do you?
A. Yes sir.
Q. Do you know defendant Stroud?
A. Yes sir.
Q. You know Duffey?
A. Yes sir.
603 Q. Do you know Murphy?
A. No sir; I may have seen him, but I don't know him.
Q. Who did he persecute?
A. The entire cell house; he would walk around the rail and bother at them when everything would be all right.
Q. Did he persecute you?
A. No sir, I kept out of his reach.
Q. Have you got a copy of the rules of the prison?
A. Yes sir.
Q. Did you ever send word to the deputy warden that he, Turner was persecuting the inmates of the prison?
A. No.
Q. Did you ever do that?
A. No sir.
Q. You knew you had a right to do that?
A. Yes sir.
Q. You didn't do it?
A. No sir.
Q. You were willing to see others persecuted as long as you were not?
A. I always attended to my own business up there. The other had the same right that I had; if a prisoner thought he was being persecuted, that man had the same right to complain that I would have.
Q. You say you got a five year sentence up there at this prison?
A. Yes sir.
Q. What kind of looking man is guard Rowe?
A. I could not describe his features very well—he is a kind of heavy set fellow—about as heavy as you are.
Q. He is still up there, at the prison?
A. I don't believe he is—I think he resigned since.
Q. What time of day did this occurrence happen up near Captain John's station?
A. It was near eight o'clock in the morning; it was in the breal

fast time—they were leaving the breakfast table, I believe that is near eight o'clock.

Q. What day of the week was it?

A. I don't remember.

Q. What month was it?

604 A. I don't remember that.

Q. Do you know whether it was in the summer or spring time?

A. I believe it was in the fall of the year.

Q. What year?

A. I believe it was in the latter part of 1915, somewhere there—it has been some time, but I think it was the latter part of the year, either November or December, probably, of 1915, somewhere, along there.

Q. Tell me of one man in the prison that told you that Turner was a bad and dangerous man?

A. A fellow of the name of Donald McGraw; he used to put the fellow in isolation and report him when he didn't have any alibi at all; he—put him in the isolation ward and have him punished.

Q. What was McGraw's number?

A. I don't remember.

Q. Is he up there now?

A. No sir, he has been released since.

Q. Where did he go?

A. I don't know.

Q. Tell me of one man that is up there that we can get hold of?

Mr. Andres: If your Honor please, we desire to object to that; it is only going into collateral matters.

The Court: Objection overruled.

And to this ruling and action of the Court defendant then and there excepted and still excepts.

A. Practically all the fellows have been discharged since; I don't remember any that was there when Turner was there.

Mr. Robertson: That is all.

Redirect examination.

By Mr. Andres:

Q. Mr. O'Dell, just a question: Mr. Robertson asked you if you have been known as the "handcuff king"?

A. Yes sir.

Q. Did you ever entertain Warden Morgan up there by showing him how you slipped handcuffs off—and things of that kind?

A. No sir. I performed in vaudeville.

605 Q. That is what I thought—have you ever done it for the benefit of the prison officials?

A. No sir.

Q. Have you ever taken part in any of those entertainments they have up there?

A. No sir.

Q. That was your call, designation, when you were on the vaudeville stage, you were known as the "handcuff king"—is that it?

A. Yes sir.

Q. You say in the instance named by me that you saw one of the prisoners walk up to Captain Purcell and was talking with him and then guard Turner came up and swung at the man and Turner knocked him down?

A. Yes sir.

Q. Now, you don't want Mr. Robertson or any other man to believe that you say that Rowe saw that, do you?

Mr. Robertson: We object to that——

The Court: I didn't understand that he said that Mr. Rowe saw it.

Mr. Andres: No sir, but Mr. Robertson put it in the man's mouth.

A. Rowe came up; I could not say whether he saw the conflict or not, he helped carry the man out.

(By Mr. Robertson:)

Q. He helped to carry him out did he?

A. Yes sir.

Mr. O'Donnell: My recollection of Mr. Purcell's testimony is that something like that occurred.

Q. How large a man was he?

A. The fellow's hair was almost white—he was a man a little bit larger than Mr. Stroud is.

(Witness Excused.)

JACK RYAN, called as a witness on the part of the defendant, being duly sworn testified as follows:

606 Direct examination

By Mr. Andres:

Q. You may state your full name to the jury.

A. John M. Ryan.

Q. What is your full name?

A. John M. Ryan—I am under the name of John J.

Q. Mr. Ryan, at the present time you are a prisoner at the Federal penitentiary?

A. Yes sir.

Q. How long have you been up here?

A. Pretty close to three years.

Q. What were you sent up there for?

A. Violation of the Harrison law.

Q. Mr. Ryan, these gentlemen didn't hear your answer to that question—what are you up there for?

A. Violation of the Harrison act.
Q. The Harrison Narcotic act?
A. Yes sir.
Q. For selling opium or drugs or something of that kind?
A. I was charged with selling drugs.
Q. How much time did you get for that?
A. Four years.
Q. Were you ever in any other penitentiary?
A. Yes sir.
Q. Where?
A. Marquette, Michigan, and Ionia, Michigan.
Q. Now, how many different penitentiaries have you been in?
A. Four.
Q. Served your time in each one, I suppose?
A. I was pardoned out of Joliet.
Q. Were you sent there on similar charges or other charges?
A. On other charges.
Q. Are you undergoing punishment in the Federal penitentiary at the present time for violating any of the rules of the institution?
A. No sir.
Q. Have you ever been punished up there?
A. I have been reported twice.
607 Q. Were you punished for it or reprimanded?
A. Reprimanded for it once—both times.
Q. But you were not put in isolation for it—anything of that kind?
A. Just over night.
Q. You were not in isolation for more than one night, at a time, that you recall?
A. Well, I was there for 17 days once, but not under punishment.
Q. What were you there for?
A. Why, on suspicion of knowing something of dope brought in the prison.
Q. And they just kept you in isolation?
A. Yes, but I was not under punishment.
Q. Mr. Duffy—or I mean, Mr. Ryan, did you know guard Turner?
A. I knew him by sight.
Q. Did you ever see him in the rock quarry?
A. Yes sir.
Q. Did you ever at any time while he was in the rock quarry see him slug or punish or beat with his fist or club any other man under him?
A. No, I didn't.
Q. What did you see with reference to that?
A. Why, there was a squabble there, and I saw him throw a colored man away from him—separate a colored man away from a white man.
Q. Describe the incident to the jury here?
A. There was a white man in the rock quarry that had some words

with a colored man, and the colored fellow started to slug the white man, and Mr. Turner went up and parted them, and the colored fellow seemed to insist on having a battle, and Mr. Turner threw him away.

Q. What do you mean by throwing him away?

A. Grabbed him by the shoulders and threw him to one side.

Q. And did the man stay in the rock quarry or did he drive him out?

A. I believe he reported him.

Q. Do you know what Mr. Turner's general reputation at
608 United States penitentiary was for being extremely cruel, hot-tempered, quick-tempered, violent and turbulent?

A. Not from my own knowledge.

Q. Overbearing?

A. Not from my own knowledge.

Q. Do you know what his general reputation was?

A. Why, I have heard he was pretty rough.

Q. That was his general reputation, there?

A. Among some of those that talked to me—not all.

Cross-examination.

By Mr. Robertson:

Q. Who was it told you he had a bad reputation?

A. Why, I could not recall now who it was: I didn't pay any attention to it.

Q. You were a drug addict when you were put in the penitentiary?

A. Yes sir.

Q. What drug were you using?

A. Cocaine, morphine and opium.

Q. Sent up from where?

A. Detroit, Michigan.

Q. How many terms have you served in the jails in Michigan?

A. Quite a number of them.

Q. Twenty?

A. No sir—not twenty.

Q. Fifteen?

A. I have been arrested fifteen times.

Q. Haven't you served eighteen terms in the jails of Detroit?

A. Possibly I have, I can't recall it.

Q. In addition to these penitentiary sentences?

A. Yes. I was apprehended by the police.

Q. Did you ever testify to this state of facts before?

A. I was a witness on the first trial.

Q. Did you testify to this state of facts before?

A. I was not asked.

Q. You remember about the occasion of a knife being found in your sock and a report being made by Mr. Morgan?

A. Yes sir.

609 Q. Yes—that time you were placed in isolation and on a restricted diet—placed in isolation and reduced to third grade?
A. Yes sir.
Q. You forgot about that a while ago, didn't you?
(No answer).

(Witness Excused.)

WILLIAM WEST, called as a witness on the part of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. O'Keefe:

Q. What is your full name?
A. William West.
Q. You are a prisoner at the Federal penitentiary, I believe, and have been how long?
A. About three years and a half.
Q. You were there at the time of the trouble between Mr. Turner and Mr. Stroud?
A. Yes sir.
Q. That occurred during the meal time, did it?
A. Yes sir.
Q. Were you in the room at the time it did occur?
A. Yes sir.
Q. I will have you look at this drawing and saying this figure here would represent about the place where Captain Purcell was; this is the west end of the room, that the south end of the room, and this is the north——
A. Yes.
Q. About where were you seated at the table on that day?
A. I was seated about back here on the end seat there.
Q. In the end seat?
A. Yes sir.
Q. That would be about——
A. About two thirds of the way back—ten or fifteen seats from the rear.
Q. You know where Stroud was seated on that day?
A. Yes, he was seated up here.
Q. About here?
A. Yes.
Q. And you were about how far back of Stroud?
610 A. Oh, about ten or fifteen tables.
Q. You say you were sitting on the end of the aisle?
A. Yes sir.
Q. Did you see part of the occurrence on that day between Stroud and Turner?
A. Yes.

Q. Mr. West, I wish you would turn to the jury and tell them in your own way just what you saw, how the matter occurred?

The Court: May the witness sit down?
Mr. O'Keefe: Yes.

A. Well, I seen Stroud get up out of his seat and raise his left hand, and guard Turner was walking up towards the back of the room; he raised up out of his seat and walked up toward guard Turner and stopped and talked a few minutes and Turner grabbed his club with his left hand, and he pulled it out like this, and Stroud grabbed it with his left hand, and Turner jerked it away and started to raise it over his head, and Stroud dropped his hand and it came up and struck him here in the breast, and walked out of the dining room.

Q. When this stab was given by Stroud to the breast, what did Turner do?

A. Why, he sunk down on the floor—he kind of turned around.

Q. Did he fall to the floor .

A. Yes sir.

Q. Now, you say you saw Stroud come out into the aisle?

A. Yes sir.

Q. Did Stroud—which direction did Stroud go in when he came the aisle?

A. Came up towards the Captain's desk.

Q. He came up towards the Captain's desk?

A. Yes sir.

Q. Now, when you saw him leave his seat and go out into the aisle, where then was Turner?

A. He was up toward the front.

611 Q. Walking in about here?

A. A little further toward the back.

Q. I wish you would point out just where Mr. Turner was?

A. He was out in the aisle, and walking toward the back of the dining room.

Q. And the two approached each other, did they?

A. Yes.

Q. Where did they finally meet, defendant Stroud and guard Turner?

A. Oh, about up in here.

Q. That would be about how many tables in front of where Stroud had been sitting?

A. Ten or twelve tables.

Q. Is that where this thing occurred?

A. Yes sir.

Q. Now, I wish you would get up in here a little in front of the jury and show the jury a little more in detail just how this occurred —say that you are Turner coming down this aisle and toward the west and I was Stroud coming up this way, if you will turn and using this pointer as a club?

A. He had the club underneath his left arm, and he came down this way——

Q. Did they come directly in front of each other, or how?

A. Well, I don't know just how they came; I seen them standing up there facing the rear of the dining room, standing that way, facing, standing there turned and as they stood there talking, Mr. Turner reached for his club and while it was up here in front Stroud grabbed it with his left hand.

Q. This hand?

A. With his left hand, grabbed it like this. Turner jerked it away, and it was up here and Stroud grabbed it again; Turner jerked it and raises it up in the air as though to strike him, and then——

Q. Then what happened?

A. Stroud struck him.

Q. Where was the club, when Stroud struck him?

612 A. Up in the air like this, drawed back as though to strike him.

Q. Did it appear that Turner was in the act of striking Stroud when he struck?

A. Well, he had it drawn up in the air like this, to strike him.

Q. Now, what did the prisoners and guards do at the time that Turner fell?

A. Well, I don't know; I was watching Stroud going out of the dining room.

Q. Who went out of the dining room with Stroud?

A. Why, I didn't see anybody. I seen Captain Purcell get out of his seat and come towards him, and then turned and went back to his seat again.

Q. Now, young man, let me remind you that we want you to talk so that that gentleman on the end can hear you, and this room is awfully hard to hear in this morning. If the jury don't hear, say so. Now when this matter occurred or about the time it was occurring, where was Captain Purcell?

A. He was sitting at his desk.

Q. That would be somewhere up in the front?

A. Yes sir, in front of that middle row of tables.

Q. Did you see him from where you were in this back end—did you see him during any part of this occurrence?

A. Who?

Q. Purcell?

A. Yes sir, I seen him sitting at his table.

Q. Do you know when it was that he left his seat up there?

A. Well, it was after Stroud walked away from Turner.

Q. After the matter was over?

A. Yes sir.

Q. Did you see him go down to Stroud—Purcell?

A. Yes sir.

Q. Now, how many different men were around those two, about the time that Purcell got down there?

A. Oh—there were several of them there, picking the guard up to carry him out.

Q. Did the prisoners remain in their seats or did they all come out, or how?

A. A couple of them got up out of their seats to pick Turner up; and the rest of them stayed in their seats.

613 Q. Did they sit there—remain seated or standing up?

A. They remained seated.

Q. How many were there in the room at that time?

A. The tables were pretty near filled up at that time.

Q. How are you men dressed, and how were you dressed on that Sunday noon?

A. Why, we had our Sunday clothes on, coat and pants, our dress uniform. We are supposed to have them on on Sunday.

Q. What I want to know is this, were you all dressed in the same style of clothes or did you have different clothes on, like these men here?

A. No sir—the same style of clothes.

Q. Did you have any caps on—anything of that kind?

A. No sir.

Q. Was there any distinguishing mark, so far as clothes are concerned, between you there?

A. Some had on neckties, that is about the only thing.

Q. That is about the only distinguishing mark?

A. Yes sir.

Q. Could you look at any of these rows here and identify men whom you knew were in that particular row, and whom you knew?

A. I could some of them—yes sir.

Q. Now, did you testify in this case before?

A. No sir.

Q. Have you been in prison ever since this happened?

A. Yes.

Q. How was it that they didn't get you on the first trial of the case?

A. I didn't get any chance to speak.

Q. Didn't let you speak to Mr. Morgan?

A. They didn't give me any chance to speak.

Q. Who didn't?

A. I didn't see anybody. I got word to Stroud and told him that I would go to the court for him if he needed me.

Q. You got word through somebody else?

A. Through somebody else.

614 Q. Before the second trial?

A. No, by men from the prison who were allowed to come up here.

Q. A witness for the defense, one who was allowed to come?

A. Yes sir.

Q. What was the occasion of your being sent up to prison?

A. Attempt to murder, highway robbery and desertion.

Q. That occurred somewhere in the south end of the United States, I believe?

A. Down in Texas.

Q. How old a man are you?

A. Twenty-two years old.
Q. Were you ever tried by a jury before being sent up here?
A. No sir.
Q. Are you a military prisoner, or how were you sent up here?
A. A military prisoner.
Q. How many men decided you were to be sent up here?
A. Twelve officers.
Q. Did you have a defense?
A. What?
Q. Did you have a lawyer there?
A. A lawyer, but no witnesses.
Q. A regular lawyer or an army officer?
A. One of the army officers.
Q. And that is the way you were adjudged a criminal and sent up to the Federal penitentiary?
A. Yes sir.
Q. For how many years?
A. Fifteen years.
Q. Did you see Mr. Turner in any trouble with any of the other prisoners there?
A. No sir.
Q. Do you know what his reputation was there among the prisoners as to being a vicious, cruel guard—do you know what the prisoners generally said about it?
A. He was a hard guard—a hard boiled.
Q. Was that the way he was generally known amongst the prisoners?
A. Yes sir.

Cross-examination.

By Mr. Robertson:

Q. Hard boil—is that what you say?
A. Yes sir.
615 Q. Where did you learn that?
A. That is a slang word.
Q. When were you down to Hutchinson, Kansas?
A. About five years ago, I think.
Q. A prisoner there at the State Reformatory?
A. Yes sir.
Q. What were you sent there for?
A. Larceny.
Q. Wasn't you sent there for forgery?
A. One to ten.
Q. For ten years?
A. One to ten.
Q. And you were let out on parol?
A. Yes sir.
Q. And while you were on parol you were sentenced to the Federal Penitentiary, weren't you?
A. After I had joined the army, yes sir.

Q. That means that you forfeited all the time at that reformatory that you were out on parol, doesn't it?
A. Yes sir.

Defendant's counsel objected to the question as calling for a legal conclusion.

Mr. Robertson: He knows what it means.
The Court: I think that may be omitted. He has stated the facts.

Q. You have not served that sentence out, have you?
A. No sir.
Q. Now you were sent up here for desertion, weren't you, from the army?
A. That is one of the charges—yes sir.
Q. And for assault with intent to kill?
A. Yes sir.
Q. And for losing your arms?
A. Yes sir.
Q. Besides the sentence that you had over at Hutchinson—is not that right?
A. Yes sir.
Q. You say that you had no opportunity to make it known that you were an available witness for Stroud so that you could be used before, do you?
A. Yes sir.
Q. Do you remember my examining you under oath in the penitentiary?
A. Not about this matter—no sir.
616 Q. No—And do you tell the jury and the court that you don't know that you could easily reach anybody through the warden or deputy warden?
A. No sir, that is pretty near impossible, in a case like that.
Q. Pretty near impossible?
A. Yes sir.
Q. And you don't know that at the prison out here when a man is charged with crime, that he has entire opportunity to talk to witnesses and to lawyers, and all that—you don't know that?
A. No sir.

Mr. O'Keefe: That is not proper cross examination, and we believe it is not a fact.
The Court: It is cross examination on a subject you went into. This witness testified in chief that he told the defendant what he has testified to here, but that he had no opportunity to tell anybody else; as I understand his testimony in chief, that is what he swore to. Now this is cross examination directly about that very subject. The objection is overruled.

And to this ruling and action of the Court defendant then and there duly excepted and still excepts.

Q. Have you been reprimanded and punished under the prison rules up there?

A. Yes sir.
Q. How many times?
A. Several times.
Q. Have you any judgment as to the number of times?
A. No sir.
Q. Could not even guess at it?
A. No sir.
Q. How long have you been in the isolation ward now?
A. About twenty-five months.
Q. Twenty-five months?
A. Yes sir.
Q. Right where you can talk to Stroud any day?
617 A. No sir, I am upstairs from Stroud.
Q. Have you been trying to get anybody to raise money to assist Stroud in this case—did you do that?
A. No sir.
Q. Didn't you attempt to get your mother to do it?
A. No sir.
Q. And didn't you curse her right there in this prison for refusing?
A. Curse who?
Q. Your mother?
A. I did not.
Q. Do you know this man here?
A. I sure do.
Q. Who is he?
A. The deputy warden.
Q. And didn't he hear that very incident that I have related, in reference to you and your mother?
A. No sir.
Q. Didn't you request your mother to mortgage her property and give you the money to give to Stroud to use in this case?
A. No sir, I didn't.
Q. And didn't you talk about that in the presence of this man, right in the prison?
A. No sir, that was not what the money was for.
Q. Didn't you curse her for refusing?
A. No sir, I didn't.
Q. How many times have you been punished for having knives in the penitentiary?
A. Once.
Q. What knife?
A. I gave that knife to Jones.
Q. That is the knife that killed Smith in the prison, isn't it?
A. No sir.
Q. Where did you get that knife?
A. Off one of the fellows.
Q. What fellow?
A. I don't know who it was—I don't know his name.
Q. Do you know who made it?
A. No sir.

Q. What say?
A. No sir.
Q. What kind of handle did it have?
A. It had a short handle on it.
Q. Bound with leather?
A. Yes sir.
618 Q. The blades sharpened to an edge on both sides?
A. Yes sir.
Q. Sharp on both sides?
A. Yes sir.
Q. Down to the point?
A. Yes sir.
Q. You have no idea how many times you have been reprimanded and punished?
A. No sir.
Q. What were you punished for?
A. Oh, for different things.
Q. Yes—for using vile and boist-rous language?
A. Yes—sometimes.
Q. And for leaving the chapel on Sunday to avoid religious services?
A. No sir.
Q. Weren't you punished for leaving the chapel on Sunday?
A. No sir.
Q. On October 11, 1915?
A. No sir.
Q. Do you know guard McGrath?
A. I know guard McGrath—yes sir.
Q. Weren't you isolated on restricted diet for that?
A. No sir, that was the time I went out in the yard one Sunday afternoon when I was in the third grade.

Mr. Robertson: That is all—I will not take further time, your Honor.

Redirect examination.

By Mr. O'Keefe:

Q. Mr. West, I will ask you if you have been a witness in this United States Court at any other time?
A. Yes sir.
Q. In what case were you a witness in this United States Court on that occasion?
A. I was a witness for the government.
Q. That was in the case of the United States against a man named Jones, for killing a man in the Federal prison?
A. Yes sir.

Mr. Robertson: That is the one where, as he testified a while ago, he gave the knife to Jones.

619 Mr. O'Keefe: I want to show that he is a good enough witness to be in the Federal court for Mr. Robertson in that case.

The Court: He is a competent witness now, and it is for the Jury to say what weight they will give his testimony in this case, as it was in the other.

Mr. O'Keefe: As a matter of fact, we want to show that the United States, that the government vouched for his credibility——

The Court: There is no certificate that will influence the jury; they are to determine from his testimony and his character and reputation as to what weight they will give his evidence. You are not to be criticized for bringing him here in this case, nor is the government to be criticized for bringing him here in some other case; for he has the right to be called, he has the right to testify; then it is for the jury to say what credit will be given him, what weight will be given to him.

Mr. Antres: I would like to make a statement——

Mr. Robertson: We object to the statement.

The Court: Any statement will not influence the jury; the jury know what they have a right to take into consideration.

620 Mr. Antres: Your honor, we attorneys for the defendant in the Stroud case have reasonable ground to believe from the line of examination by Mr. Robertson that he will argue from the fact that this witness violated the law and the rules of the prison, that his evidence should not be accepted by the jury——

The Court: He will not have any right to make that argument unless there is some evidence tending to establish that fact; and if there be such evidence, he will have a right to make the argument and it will be a legitimate argument.

Mr. Antres: Now, besides that, if your honor please, we want to show that the very witness on the witness stand, is one of the witnesses that appeared for the government in a case where the same charge is brought.

The Court: He has already testified that he appeared as a witness in that case—that is now in proof.

Mr. Antres: Along the same line, if your honor please, Mr. Robertson asked this witness if he didn't take his sworn statement in regard to Mr. Stroud?

The Court: You asked him that a moment ago?

Mr. Antres: Mr. Robertson asked him that.

The Court: Now ask him about that.

Mr. Antres: Mr. O'Keefe is examining the witness and it is to be suggested to him.

The Court: Ask him any questions that you care to upon that subject.

Q. You were a witness were you in the case of the United States against Jones?

A. Yes sir.

The Court: Now, he has stated that twice, Mr. O'Keefe.

621 Q. Upon whose part were you a witness in that case?

A. The government.
Q. The government?
A. Yes sir.
Q. I will ask you if at that time Mr. Robertson sprung this list upon you for the benefit of the jury?
A. No sir, he didn't.

Mr. Robertson: That is objected to.
The Court: That question is objectionable, I think.

And to this ruling and action of the court defendant then and there duly excepted and still excepts.

The Court: You had a right to cross examine him in that case as Mr. Robertson has in this case.
Mr. O'Keefe: I was not in the case, your honor.
The Court: Well, whoever represented the defendant.

(Witness excused.)

WILL COATES, called as a witness on the part of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. O'Keefe:

Q. What is your full name?
A. Will Coates.
Q. How old a man are you Mr. Coates?
A. Twenty six years old.
Q. You are at the present time a prisoner at the United States Federal penitentiary, I believe?
A. Yes sir.
Q. And you have been how long?
A. Two years and a half.
Q. What are you there for—as a military prisoner or civil prisoner?
A. As a military prisoner.
Q. Where were you sent from?
A. Fort Bliss, Texas.
Q. Fort Bliss is right alongside of El Paso, I believe?
A. Yes sir.
Q. For what were you sent to the penitentiary?
622 A. For assault with intent to kill.
Q. Were you tried by a jury in the criminal court, or by a military committee?
A. By a military court martial.
Q. And were you represented there by any lawyers?
A. No sir.
Q. How?
A. No sir.
Q. Do you know the defendant in this case?

A. Yes sir.
Q. And did you know guard Turner during his life time?
A. Yes sir.
Q. I will ask you if you were at the meal or dinner on Sunday of this occurrence?
A. Yes sir.
Q. Now, this in a way somewhat represents the dining room at the Federal penitentiary—see—you know where Captain Purcell sat on that day?
A. Yes sir.
Q. Saying that this would be Purcell's seat here on this west end of the room, this the north side of the room and that the south side—how many tiers of seats were there in there that day?

The Court: There don't seem to be any dispute about that.

Q. In which of these tiers or rows of seats did you sit, taking it from the south?
A. In the center.
Q. In the center one?
A. Yes sir.
Q. I wish you would step down here, or step right inside and point out the place about where you were sitting?
A. Right about there.
Q. Do you know where Stroud was sitting on that day?
A. Sitting right about here?
Q. About right there—How many rows west of Stroud were you on that day?
A. I was about ten.
Q. In other words you were ten back of him?
A. Yes sir.

Q. Now, did you see guard Turner in the aisle on that day,
623 before this thing occurred?

A. No sir, I didn't notice him.
Q. You didn't notice him?
A. No sir.
Q. You may take your seat back,—now I wish you would turn and tell the jury just what you saw, and how it was that you saw it—just placing Turner where he was and Stroud where he was?
A. We had marched into the dining hall, and were seated at the tables, I suppose about ten minutes, and my attention was attracted to where Stroud and Turner were by convicts pointing over in that direction, and I myself watched, and it seemed as though they was carrying on a conversation, and Stroud he wanted something—I suppose he wanted to get up out of his chair, and guard Turner lifted his club int- the air to strike him. Stroud grabbed ahold of his arm and was ahold of his arm, and then the other men stood up, men that were in front of me, and I could not see any more.
Q. Now, when you first saw them were the two men standing alongside each other or where were they?
A. Stroud was turning in his chair.
Q. Where was Turner?

A. Turner was standing in the aisle next to him.
Q. In front of him or behind him?
A. By the side of him.
Q. By the side of him?
A. Yes sir.
Q. Was he even with the same tier—or was he even with where he was, or how?
A. Even with the same tier.
Q. Then what was the next thing that you saw?
A. I saw Stroud get up and I saw guard Turner raise his club in the air.
Q. After he got up?
A. Yes sir.
Q. I wish you would step down here and illustrate just the position the two men were in, and this action of the club, if you
624 will, please—now say that you were Turner and I was Stroud and that the guard would be up near that window there—which was nearer, the guard or Stroud?
A. Nearer what?
Q. Nearer the Captain, the guard or Stroud?
A. Why Stroud was sitting down and Turner was standing here—they were both quite a ways from the Captain.
Q. Then what happened?
A. Stroud wanted something, and he wanted to get up from his chair; he would have to turn this way to get up out of his chair to walk this way; Turner was standing here and he held some conversation, and Turner raised his club like that and went to strike at Stroud and Stroud caught his arm.
Q. Oh, he caught his arm?
A. Yes, caught hold of his arm.
Q. What hand did he use on his arm—were you in position to see?
A. No, I was not in position where I could see his body, I could only see his hand.
Q. You were over here somewhere?
A. Yes sir.
Q. Now, after he caught his arm, what happened?
A. I could not see very well, because—there was just a little tussle.
Q. There was a tussle there?
A. Yes sir.
Q. Go ahead?
A. And at that time the men that were sitting in front of me stood up and I could not see any more.
Q. You could not see them?
A. I could not see them any more.
Q. You say what you saw was a club raised and Stroud have his hand over there upon the raised club?
A. He had hold of his arm.
Q. That is the thing as you saw it?
A. That is as I saw it.

Q. Take your seat please—I will ask you if you saw any other occurrence just before that in which Turner took a part?
A. No sir.
Q. You didn't see any?
A. No sir.
625 Q. Do you know what Turner's reputation was amongst the prisoners there as to being a vicious brutal guard?
A. Why——
Q. Just answer yes or no.
A. Yes.
Q. Just tell the jury what that was—was it good or bad?
A. Bad.

Mr. O'Keefe: That is all.

Cross-examination.

By Mr. Robertson:

Q. Who did you hear say that Turner's reputation was bad?
A. A number of convicts.
Q. Name one of them?
A. George Murphy.
Q. George Murphy?
A. Yes sir.
Q. He has testified in this case?
A. I believe so.
Q. Who else?
A. Chaffee.
Q. Who?
A. Ed Chaffee, I believe his name is, I don't——
Q. Is he up there now?
A. Yes sir.
Q. Spell it?
A. Chaffy.
Q. What is his number?
A. I don't know.
Q. Anybody else?
A. O'Malley.
Q. Yes—what is his number?
A. I don't know.
Q. He has been subpeonaed as a witness in this case, hasn't he?
A. I don't know that.
Q. Who else?
A. That is all I know.
Q. Didn't you hear Stratton say so?
A. No sir.
Q. Nor West?
A. No sir.
Q. Who was it you tried to kill down there?
A. Where at?

Q. The time you got this sentence?
A. A fellow member of the troop that I was in.
Q. How long a sentence did you get?
A. Ten years.
Q. Do you know the witness Duffy that was on the stand?
A. Yes sir.
Q. How long did you and Duffy cell together?
626 A. Twenty months.
Q. Did you ever testify before in this case?
A. No sir.
Q. When did you come to that prison?
A. March 8, 1916.
Q. That was just a few days before this occurrence?
A. Yes sir.
Q. You knew Stroud pretty well, did you?
A. Not too well—no sir.
Q. You knew him?
A. Yes sir.
Q. Who did you first relate your evidence to in this case.
A. How do you mean?
Q. Who did you first tell the things you have related here this morning?
A. Why, just talking among ourselves.
Q. Who do you mean by that—ourselves?
A. I mean the fellows that I work with.
Q. How did Stroud find it out?
A. Stroud find what out?
Q. That you knew these things that you have testified to here this morning?
A. I don't know if he knew it or not.
Q. You are quite sure that you saw Stroud grab the man's arm?
A. Yes sir.
Q. Are you certain about that?
A. Yes sir, I am certain.
Q. Absolutely?
A. Absolutely.
Q. While he had the club up in the air?
A. Yes sir.
Q. Which hand did Stroud grab that arm with?
A. His left, I believe?
Q. What was he doing with his right?
A. I could not see his right.

Mr. Robertson: All right; that is all.

Redirect examination.

By Mr. O'Keefe:

Q. Just a moment—he has asked you who you told about this—were these conversations with the different prisoners at the same time or different times?

A. Why, different times.

Q. Now, how many others, in your judgment, actually saw this occurrence there, on the day that this encounter occurred?

627 The Court: That is calling for his opinion, Mr. O'Keefe.

Mr. O'Keefe: I would not call it a matter of opinion, if your honor please.

The Court: The idea is, how many people were near—and the jury knows the surroundings there. It is my idea that as to the number of those present that actually saw it, would be to express merely his opinion.

And to this ruling and action of the Court defendant then and there duly excepted and still excepts.

Q. How many prisoners to your knowledge talked about this occurrence that told you how they saw it?

Mr. Robertson: That is objected to as immaterial, and calls for hearsay.

The Court: Sustained.

And to this ruling and action of the Court defendant then and there duly excepted and still excepts.

Q. Did you have any means of communicating with Mr. Stroud's lawyers to tell them what you knew or that you knew anything?

A. No sir.

Q. Do you know how we found it out?

A. No sir.

Q. Did you or any other prisoner have any means of communicating with this man or telling him what they knew about it?

A. Not that I know of.

Mr. Robertson: That is objected to——

The Court: I think I will have to interrupt that line of inquiry. We find him here as a witness, under the order of this Court; you found out in some way and in ample time to have him here
628 at this time that he knew something that you thought was material. If this line of inquiry is for the purpose of casting any suspicion on the warden and those in charge of the institution that they were trying to conceal witnesses, I shall have to say now that you have the process of this court now open to you to have every man in that institution as a witness in this case; and I want to say further that when I was here a month ago, counsel for the defendant went to the institution by appointment with the warden, and, as I was advised by counsel, they were permitted to talk to anyone in that institution that they cared to talk to about this case; and since this trial has been on, that has been again permitted; and I want you to understand that you have now the privilege as attorneys for the defendant to go there again and again and again, and see anyone you please, and I will hold this case until you have done that.

Mr. O'Keefe: If your honor please, it is not the intention of my-

self or of any attorney here to assume a position adverse to the warden or any of the officers of the prison. They have treated us as kind as possible; the purpose of asking these few questions was to show that it was impossible for us, even with the permission of the warden, to reach these men——

The Court: It would be immaterial for that purpose because he is here now as a witness.

629 Mr. O'Keefe: It would be impossible for us to get up there and talk with the thousand or more men up there. That is all.

And to the ruling and action of the Court indicated in the last stated remarks of the Court, defendant then and there excepted and still excepts.

(Witness Excused.)

JAMES MORRISON DARNELL, called as a witness on the part of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. O'Keefe:

Q. What is your full name?
A. James Morrison Darnell.
Q. How old a man are you, Mr. Darnell?
A. Twenty-nine years old.
Q. Where do you reside at the present time?
A. Peoria, Illinois.
Q. What place?
A. Peoria, Illinois.
Q. What is your business—occupation?
A. I am employed by the Avery Company, makers of motor cultivators and motor tractors for the allied armies.
Q. You are engaged as I understand it in the motor truck business?
A. Yes sir.
Q. Are you in easy circumstances now, or how are you fixed?
A. I am not in needy circumstances.
Q. Worth about how much money?
A. Possibly sixty or seventy thousand dollars.
Q. Now, you were in the military prison here at the time of this occurrence, were you?
A. No sir, in the Federal prison.

Q. In the Federal prison rather—how long had you at that
630 time been in the Federal penitentiary?

A. I was sent to the Federal prison in May—I think I had been there slightly over—slightly under a year.
Q. And in what connection were you sent there?
A. I was sent there for a technical violation of the Mann act.
Q. That is, you were charged with taking a woman from one state to another?

A. Yes sir, for personal illicit relations rather than commercial vice. I pleaded not guilty.

Q. You pleaded not guilty?

A. Yes sir.

Q. That was not commercial?

A. I pleaded not guilty to any offense under the law.

Q. Were you found not guilty finally?

A. I was.

Q. Was the girl a witness for you or not?

A. She was a witness for me.

Q. And her mother?

A. Was a witness for me.

Q. Were you guilty?

A. No sir.

Q. Now, when you were sent to the Federal penitentiary, what line were you put in up there?

A. For the first nine or ten months, as head nurse of the hospital, then I became an employe in the store room, and worked under Mr. Carrol of the construction department—he took the trusties and outside men.

Q. Were you a trusty there during that time?

A. I was.

Q. Did you have the privilege of leaving the prison walls there?

A. While at the store room, I had the privilege of leaving the prison walls; while in the hopital I had the privilege of the yard until 9:30 at night.

Q. Did you have the privileges of a trusty during the time you were there?

A. During the time I was there I was a trusty. During the last three months, I was in the laundry, after Stroud's second
631 trial.

Q. Were there any marks against you while you were there?

A. I think at one time I was reported for not keeping my quarters clean—I was not a good housekeeper.

Q. Any other marks against you?

A. No other marks against me in the prison that I know anything about.

Q. Did you while you were there, meet the defendant in this case?

A. Many times.

Q. Was he an inmate of the hospital while you were there?

A. A great many times.

Q. How long a time would he be in the hospital there, as you remember it?

A. Sometimes possibly for one or two days—sometimes for quite a bit longer—I think he was usually marked in by Dr. Yohe as having the grippe—sometimes for observation, I believe.

Q. What do you mean by "for observation"—observation for what?

A. I understood—for observation as to his condition—I under-

stood in Stroud's case it was psycopathical, but I could not say that that always meant psychopathical.

Q. What do you mean by psychopathical?

A. They wanted to know whether he was right mentally or not—what various symptoms he had would develop.

Q. How often was he there for observation psychopathically?

A. I could not state without looking at the hospital record—I don't know.

Q. Was that the exception or was it often?

A. Yes sir, we looked upon Mr. Stroud as a patient that should be observed at all times.

Q. Tell us where you were on that day, were you in the middle row on the date of this occurrence?

A. I was.

632 Q. Where were you on that day?

A. Possibly 15 feet from Mr. Stroud, in front of him, and toward the west, I think—I can tell you if I had a diagram, I could point out the seat I was in.

Q. Here is what is presumed to be a general outline of the room up there—just remain where you are; say this would be the captain's seat up in front or to the east of the room—there is east on this map?

A. Yes sir.

Q. And this is west?

A. Yes sir.

Q. Say this would be the north wall? That wall there, and this is the west wall, and that the south wall—now, how many tiers of seats were there in that room?

A. There were five tiers—five sections, you mean?

Q. Yes?

A. Five sections.

Q. What portion of the room were the outlets to and from the room?

A. You say that is the west side?

Q. This is the west side, here?

A. To the northwest, to the side of the captain's desk.

Q. That would be the outlet for the prisoners would it?

A. On the north side of the captain, on the northeast side it is, rather, from the room.

Q. This would be into the kitchen, this entrance here?

A. Yes sir; and behind the captain's desk there is another little outlet into the rotunda.

Q. There is another little entrance into the rotunda there?

A. Yes sir.

Q. You have a band playing during the meal?

A. Yes sir.

Mr. Robertson: I was speaking to Mr. Harvey. You located the witness in the dining room, did you?

Mr. O'Keefe: No sir, not yet.

633 Q. Where was the band located with reference to Mr. Purcell's seat that day?

A. Between Mr. Purcell's seat and the entrance into the kitchen.
Q. That would be on the north side of Mr. Purcell?
A. I think so—yes sir.
Q. How many pieces were there in that band on that day?
A. I could not say, but I believe the average number was about twelve—it ran as high as twenty at times and sometimes only four or five and they called it an orchestra—I don't remember on that day, but I would say about a dozen.
Q. I wish you would take this pointer and point out for the jury's benefit, just where you were on that day?
A. I was in an end seat and one of these seats right along here, about, I think, about here.
Q. Here?
A. One to the front.
Q. Up one to the front?
A. Yes sir; right about here?
Q. That would be in the fourth aisle?
A. Yes sir.
Q. From the south?
A. Yes sir.
Q. Now, point out about the place where Stroud was on that day.
A. Some place right in here, at a position that gave me an unobstructed view across the dining room.
Q. Did you see part of this occurrence on that day?
A. I did.
Q. Did you see where Turner was just before the killing?
A. I saw Turner walking up and down this aisle—walking possibly half way—I think I noticed him three or four times.
Q. What first attracted your attention—what were you doing at about that same time?
A. We had pork chops for dinner that day, and they were not done, and I wanted a portion of pork chops that was well cooked. There are not only about a third of the number of the waiters in that drawing—there ought to be three times that there, any-
634 way.
Q. Go ahead and describe what you were doing?

The Court: He don't need the map for that, let him sit down. Proceed with his statement.

Q. Go ahead?
A. I was turning to one of the waiters to signal for the portion of well done meat, and I think I had turned possibly two times, twice or three times toward the waiters to get some of the meat, and after the third—or I think about after the second time that I turned to the waiters to get some meat, I didn't dare turn my head all the way around, that would be a violation of the prison rule, and I turned it part way around, and as I would turn it naturally my eyes wandered around the room. I had another habit of looking at the prison clock—it never kept time, but I looked at it anyway, and the clock was on the side of the room where Stroud was; as I was turning in that direction I was glancing in that direction after turning for the

meat, I noticed Stroud step into the aisle and I also noticed guard Turner walking down the aisle, he having just walked to the head of the aisle and was going back.

Q. Right there, you say you noticed Stroud step into the aisle?

A. I did.

Q. And you saw Turner walking down the aisle?

A. I did.

Q. From which direction was Turner at the time coming, from the east, from where the Captain was, or was he coming from the west?

A. From the east, the way the Captain was, from toward the captain's desk.

Q. What did Stroud do just after he got out of his seat?

A. He started in the direction that a man would take going toward the toilet.

635 Q. He started in the direction a man would take going toward the toilet?

A. Yes sir.

Q. Would that be toward the direction that the Captain was, toward the east?

A. Yes, that was the rule that the men always had to go toward the east, toward the captain.

Q. Did he at any time go toward the west on that day?

A. I didn't notice it.

Q. Now then, tell us what happened?

A. Stroud took possibly four steps toward the front and met Mr. Turner, the guard, and Turner turned facing Stroud and Stroud turned facing Turner; they had been coming one this way and one this way, and when they got together, instead of passing, Stroud had this position and Turner had this position, a little to the rear, and they stood then and engaged in a brief conversation. It could not have been very long, I would not estimate the time at more than a minute—it might have been more or less, but a very brief conversation, and Stroud, a very nervous man as I observed in the hospital, and I was always watching him, and Turner received the same amount of care from me, as we were afraid of him, and they had a conversation to the extent of a few words, and Turner whipped out his club and Stroud grabbed it with his left hand, and Turner jerked the club back, and Stroud grabbed both hands, and then Turner's hand went up with the club to strike, and just as I noticed Stroud making a move I glanced back again at the waiter—I knew that something was going to happen—any time any guard and any prisoner stops and talk, any man in the prison naturally raises in his seat a little to see what is going on.

Q. Now, did you see Turner fall?

A. I did.

Q. Did you see him carried out?

A. Yes sir.

636 Q. Now, at the time of this club battle, this difficulty whatever it happened to be, where was Captain Purcell?

A. Captain Purcell was at his station in front.

Q. Did you notice when he left his desk?

A. As I remember, he left his desk when he saw there was a struggle, and just about as I saw there was a struggle, or as Turner fell—I think more likely as Turner fell.

Q. Do you know where Captain Purcell went at that time?

A. He walked down the aisle after Turner had fallen.

Q. Now, right at that point I want you to tell us about the feeding of the prisoners up there, and the supplying them with the food at the different seats, and the occupation of these aisles by the waiters and others during the meal times—you have been there, and I think you can intelligently tell us?

A. There were a number of prisoners who were waiters serving the prisoners walking up and down the aisle—I stated before, three times as many waiters as there are in the picture, the diagram. There are two guards in each aisle, and sometimes three or four —three guards frequently.

Q. Now, this picture makes this aisle here, the one where this thing occurred, seem wider than the others; I will ask you if there is the same width in all of the aisles?

A. I believe they are of the same width.

Q. How many men are there to each row, to each tier of seats?

A. How many diners?

Q. Yes?

A. Six.

Q. Six diners—was this row filled, this second row filled on that day, with men?

A. I could not say whether it was or not; I don't think it was. Most of the rows are filled from the rear coming forward rather than going down.

Q. Now, from where—where did the waiters get their milk
637 and water and food that they are supplying to the men?

A. They get some portions of the food from the rear end of the room.

Q. That would be in the back here?

A. Yes sir.

Q. That would have been previously placed there?

A. Just a few minutes before the meal was served.

Q. From where else would they get the food during the noon hour?

A. They would get the bread and coffee and some other articles of food from the front, coming from the kitchen.

Q. That would be up here?

A. Yes sir.

Q. Now in getting from these aisles back after more food, how would they go and come from this second aisle here, would they come directly in front or go around through this aisle?

A. Come directly in front; of course when the dining room is opened, there is always one can of water and one can of coffee setting in the front, then the waiters who have the water and coffee can distribute that as the men are coming in, but after the first small portion of water and coffee is used up they will have to go into the

kitchen—that will be about three minutes after the first coffee is served.

Q. In addition to the noise of the moving waiters and the stirring of the men during a meal time, was there any other noise during this occurrence?

A. A jaz- band was playing.

Q. The band was playing?

A. Yes sir.

Q. Do you know the name of the piece the band was playing at that time?

A. No, I don't know the name of the piece; I heard some of the boys saying it was something about paradise, but I don'. know the name of the piece—I have not the least idea.

Q. Now, of what college were you a graduate before you got into this trouble?

638 A. After graduating from Spalding Institute I went to Lombard College at Galesburg, Illinois and took two years of the course when I was taken ill of pneumonia and left the college; then I went back and took something less than a year, and still suffering from the weakened condition from pneumonia, I left, as a junior, and went to my father's farm; and then after vacationing for about a year, I went to the University of Chicago, and took two years' work at the University of Chicago; shortly after I had taken the second year, I went to the United States court in the case where I was tried.

Q. Did you ever study for the ministry?

A. I did.

Q. Were you an ordained minister?

A. I was.

Q. Of what religion were you an ordained minister?

A. The Universalist church.

Q. Have you practiced your religion since leaving the penitentiary?

A. You mean as a minister?

Q. Yes?

A. Not as a minister, no sir. I attended services regularly, but would go by call; since leaving the prison I have worked for the minister in Peoria, but not in the ministerial capacity. I am interested in the church work.

Q. Now, in the Federal penitentiary what was your rating and standing there?

A. I became a trusty after I had been there a very few weeks; I had the privilege of the yard after I had been there a very few days; I think I was what was called, what is similar to a parole man after I had been there a few days, and I became a trusty with the star after I had been in the institution, as I say, a few weeks, and I kept the star until after I went to the laundry. I believe that the record shows that I had the trusty-ship revoked because of a change of work and I had no occasion to go out of the institution for the last few weeks.

Q. You left the institution, as a star or honor man?

639 A. No, I was not a star man the last few weeks I was there; the star was revoked after I was in the laundry, as that was called.

Q. That is, they didn't have the position open at that time, is that it?

A. I think one man had villed the position.

Q. Are you on good terms with Warden Morgan as far as you know?

A. So far as I know, I am with Warden Morgan and many of the officials; I have no grudge against any of the men there; surely I have no grudge for any official of the institution.

Q. You have told this occurrence just as you saw it happen that day, have you?

A. Absolutely.

Q. Did you know the dead man personally during his life?

A. I did.

Q. Did you have occasion to meet him at various times and places while you were there acting in various capacities?

A. I met him various times and talked with him various times.

Mr. O'Keefe: That is all.

Cross-examination.

By Mr. Robertson:

Q. The defendant Stroud, I understood you to say, is a very nervous individual?

A. He was at the time I was in the institution and had anything to do with him at the hospital.

Q. Let me ask you if it is not a fact that he is noted among his associates for being a most cold and deliberate individual?

Mr. O'Keefe: That is objected to as irrelevant and immaterial.

The Court: Overruled.

And to this ruling and action of the court defendant then and there duly excepted and still excepts.

A. Absolutely not—known as a very nervous man.

Q. Have you had any occasion to observe his conduct in
640 the court room here at the trial, his manner?

A. This is the first time I have been in the Court Room, except possibly a minute or minute and a half when I first came to the city.

Q. Now, if I understand you correctly, you want to say to the jury and did say that Stroud was in the hospital frequently for mental difficulties—is that right?

A. That is not what I said.

Q. Then tell the jury what you said?

A. I said Stroud was in the hospital a large number of times, many times; several times I remember, as I remember, the symptoms were known as Grippe, other times as I remember, he was marked in

the case sheet bearing the word "observation" or letters "obs.," and I understood in Stroud's case and in a large number of other cases—no, I should say ten or twelve cases——

Q. Never mind the other cases——

A. That the word "observation"—"obs.," would mean observation from a psychopathical point of view.

Q. Have you studied medicine?

A. Not extensively.

Q. Have you at all?

A. I have studied a few medical text-books.

Q. In what school did you study medicine?

A. I read these medical books while at the University of Chicago.

Q. Where did you make a study of mental diseases?

A. At the United States penitentiary at Leavenworth, Kansas, while I was in the hospital—while I was head nurse of the hospital it was my privilege to speak with Dr. Yohe a great many times and speak of the various symptoms of the patients, and I had access to his library with his full permission, and I read them as well as one could read them who had no professor instructing him; I read the books several times.

Q. Who was the prison physicial during the time that you were connected with the hospital?

641 A. Most of the time the regular physician was Dr. A. F. Yohe.

Q. When were you in the hospital?

A. I think I went to the hospital about the 4th of July; I arrived in Leavenworth about the 25th of May, and I went to the hospital about the 4th of July; I left sometime after Christmas.

Q. What year, please?

A. I believe 1915.

Mr. O'Keefe: You will have to talk a little louder; it is awfully hard to hear in this room, and not so fast either.

Q. I have not got it clear in my mind when you were in the hospital—was it all in 1915?

A. A small portion in 1916—I could not tell you just how many days, but a small portion in 1916.

Q. What month did you leave the hospital?

A. I should say in January or February, but I might be mistaken, I could not say.

Q. When did you——

A. I believe it was even later than that—I think it was near Easter.

Q. And when did you go into the hospital?

A. The Fourth of July.

Q. 1915?

A. I believe it was the Fourth of July—I could not be positive; I am a little hazy about that. I beg pardon, it was not the Fourth of July, it was on a Sunday.

Q. What month?

A. I believe in July, right after the Fourth. Mr. Reno called me from the corridor—I was helping in the corridor,—and some time afterwards became head man.

Q. You were in the hospital from July until some time in January the following year?

A. I think so.

Q. Beginning in July, 1915?

A. I believe it was 1915.

Q. Now tell the court and jury how soon after you went in the hospital Stroud was first there for mental observation?

642 A. I could not say; that would have to be looked up on his case sheet, from the hospital—I don't know.

Q. What do you mean by case sheets from the hospital—the hospital record?

A. Yes, that could be called the hospital record; we have three different records that are made out there.

Q. Was he there in July?

A. I could not say whether he was there in July or not. He was there I think twice if not three times before the baseball season closed, and I believe that closes early in the fall.

Q. In September?

A. I could not say; I think in September. You will have to get that from one of the officials—I could not say positively.

Q. Don't you know the time when the baseball season closes now?

A. Not in Leavenworth—not in the penitentiary; in there it might be in September or in October. You understand we do things differently in the prison from what they do outside.

Q. How many times do you say Stroud was there in August?

A. I didn't say. He was there twice—I think three times—before the baseball season closed. I remember one specific time he was there, whether the record shows observation or not, it certainly was observation; we had a rather extensive discussion in the hospital.

Q. Why do you say "whether the record shows it or not—do you have a kind of fear of the record?

A. I assure you, not. I am not sure of anything but what I know is the truth. I am not sure whether it was grippe or possibly observation, that the record clerk put down. He was a prisoner like the rest of us, and I know sometimes he would not put down the prisoners' right names, as the prisoner wanted it done.

Q. When did you leave this prison?

A. The tenth of September, 1917.

643 Q. When did you enter it?

A. In May—Tuesday morning, I think the 25th—the 24th or 25th. My sentence began the 21st at Milwaukee, Wisconsin, and I came to Leavenworth after the sentence had been running I think three or four days.

Q. In May of what year?

A. 1915.

Q. May I ask you again what date you left the prison up there?

A. September 10, 1917.

Q. Did you ever testify in this case before?
A. Never.
Q. You say you are on entirely friendly terms with the officials of the penitentiary?
A. I have not said that. I said I had no grudge against any official.
Q. Do you remember when you went out of the prison, you published a series of articles?
A. I do.
Q. Attacking the institution and the officials of it?
A. No sir, attacking the system.
—. And some of them were published and then they ceased, didn't they, after a bit?
A. Those articles were merely a portion of a book of mine that I was not ready to give out.
Q. Why did they cease to run?
A. Because there were only four of those articles and they were gone over by a cub reporter and the first one was so full of egregious mistakes that I didn't want them run under my name.
Q. You are very careful about your name?
A. I am.

Mr. Robertson: That is all.

The defendant here rested his case.

Mr. Robertson: Yes, we will have considerable rebuttal from the last development here.
The Court: We will suspend now until 1:45.

And thereupon the court took a recess until 1:45 p. m. o'clock of the same day; at which last mentioned hour, the trial of
644 this was resumed, as follows:

The Court: Proceed, Mr. Robertson.

And thereupon the government introduced and offered the following evidence in rebuttal:

DENNIS MCGRATH, being duly sworn, as a witness on the part of the government, testified as follows:

Direct examination.

By Mr. Robertson:

Q. What is your name?
A. Dennis McGrath.
Q. Are you a government officer at the United States Penitentiary here at Leavenworth?
A. Yes sir.
Q. What is your official position?
A. At the present time?

Q. Yes sir?
A. Guard.
Q. You remember the occasion of going back to Ohio and getting prisoner Stratton?
A. To Lorain, Ohio—yes sir.
Q. Whereabouts?
A. To Lorain, Ohio.
Q. When was that, Mr. McGrath?
A. I think it was in the latter part of September—I am not positive.
Q. What year?
A. 1916.
Q. 1916?
A. Yes.
Q. Who, if anyone were you with?
A. Captain John Purcell.
Q. Did you return with this man from Lorain, Ohio?
A. Who, Stratton?
Q. With Stratton?
A. Yes sir.
Q. And captain Purcell came also?
A. Yes sir.
Q. Did you go with Captain Purcell, or he with you—how was that?
A. We both went together.
Q. You both went together after this man?
A. Yes sir.
Q. And came home together?
A. And came home together.
645 Q. Did you go by way of Chicago?
A. Yes sir.
Q. To Lorain, Ohio?
A. Yes sir.
Q. Just explain to the jury how you traveled together between Lorain and Chicago?
A. We left Lorain, Ohio, about 8 o'clock on Saturday evening, and——

The Court: How is that?

A. We left Lorain, Ohio, about 8 o'clock on Saturday evening, I believe and we arrived in Chicago the next morning somewhere about eight o'clock or 8:30.
Q. Did you travel in a Pullman or a chair car?
A. We were in a Pullman car the first night out of Lorain.
Q. And during the forenoon, approaching Chicago, in what kind of coach were you traveling?
A. We were still in the Pullman.
Q. You were still in the Pullman?
A. Yes sir.

Q. Now, what I am interested in knowing, is whether you sat together all the time?

A. All the time—yes sir.

Q. I will ask you whether or not, between Lorain, Ohio, and Chicago, Illinois, you heard Captain Purcell say to Stratton or make an expression to Stratton that in substance would be like this: I told Turner that I expected him to get hurt before he did because he was getting pretty raw with that club, but I didn't expect Robert to do it, as Robert was—is a good fellow?

A. I never heard any such remark.

Q. You knew at that time who Stroud was?

A. Yes sir.

Q. And you knew about the occurrence with guard Turner?

A. Yes sir.

Q. And you knew guard Turner in his lifetime?

A. Yes sir.

Q. And was that occurrence of Stroud and Turner discussed on that trip?

A. Never heard a word about it?

Q. It was never mentioned in your presence?

A. No sir.

646 The Court: What time did he say that he got to Chicago?

Q. What time did you get to Chicago?

A. I judge about 8 o'clock Sunday morning—about 8:30 Sunday morning.

Cross-examination.

By Mr. O'Donnell:

Q. Mr. McGrath, you were not awake all the time that night were you?

A. All the time—yes sir.

Q. All night?

A. All the time.

Mr. O'Donnell: That is all.

(Witness excused.)

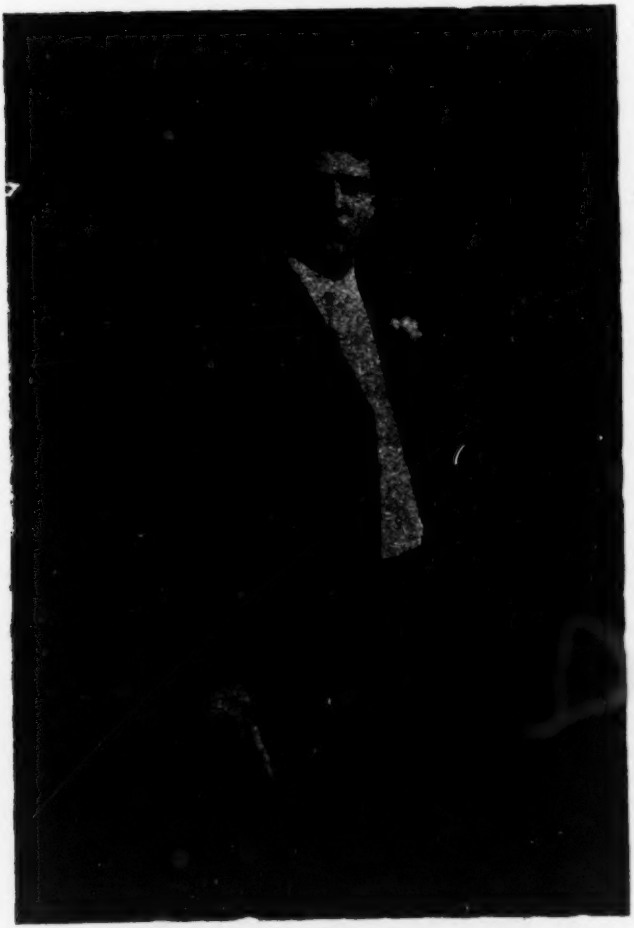
Mrs. Ida Turner, recalled as a witness on the part of the government, further testified as follows:

Direct examination.

By Mr. Robertson:

Q. I hand you this picture which has been marked exhibit "22" and ask you whether or not that is a photograph of your husband?

A. It is.



Q. A good picture of him, is it?
A. Very.

Mr. Robertson: I offer the picture in evidence.

Defendant's counsel objected to the picture offered on the ground that it is not rebuttal.

The Court: I don't recall any evidence on the part of the prosecution as to the physical appearance of the deceased Turner. The defendant, as I recall it, attempted to show that he was a powerful man.

Mr. Robertson: Yes; the witness described him as "gigantic." If this picture is any indication of his physique, I think it is competent in rebuttal of the defense; and there is this in it, that there is some sort of claim made here that Mr. Turner was overbear-
647 ing, a brutal sort of individual. Of course we can tell a good deal by a person's features about that sort of thing. We offer it for that purpose too.

Mr. O'Keefe: A photograph is no evidence as to his brutality.

The Court: I will not pass on what qualities a photograph shows, further than it may give some idea of his physique. The objection is overruled.

And to this ruling and action of the Court defendant then and there duly excepted and still excepts.

Mr. Robertson: I understand the jury may see it, your Honor?
The Court: Yes.

And to this ruling and action of the Court defendant then and there duly excepted and still excepts.

(The photograph hereto attached is a copy of said Exhibit 22.)

648 Cr. examination.

by Mr. O'Keefe:

Q. When was this photograph taken?
A. Six years before he was killed.
Q. Then at the time this photograph was taken he was six years younger?
A. Yes sir.
Q. What did he then weigh?
A. About 155 pounds.
Q. What did he weigh at the time of his death?
A. About, I should judge, 170 or 175—I don't know exactly.
Q. He had increased in weight a great deal from what he was when this photograph was taken?

The Court: 20 pounds—she has already told us how much.

Q. Have you any accurate way of knowing what he did weigh at the time of his death?
A. I have not.
Q. Were you present when he was weighed at any time within a year or two of his death?
A. No sir.
Q. He was a heavier looking man was he not, at the time of his death, than at the time this photograph was taken?
A. I think so, although after that picture was taken he got a great deal lighter and then got heavier; he may have been about the same size, but I think he was heavier.
Q. How tall a man was your husband?
A. Five feet 11 inches.
Q. Was he well filled out for a man of that height?
A. Pretty well, yes sir.
Q. That was taken six years before. I want to know if at the time of his death he wasn't a great, wide shouldered man?
A. Not a great deal larger than that, possibly the same size.
Q. This picture was taken six years before; it would not give any indication at the time of his death in regard to the width of his shoulders?
649 A. There might have been some change—not a great deal.
Q. How were his muscles at the time of his death—great heavy muscles, were they not?
A. Not out of the way.
Q. Was he suffering from any defect of his arms or limbs?
A. Not that I know of.
Q. Had he had any serious injury to his arms or limbs?
A. Not that I know of.
Q. As a matter of fact, didn't he pride himself on his strong physical condition?
A. Never heard him pride himself on anything.

Q. How old a man was he at the time of his death?
A. He would have been 40 if he had lived another week.

Mr. O'Keefe: That is all.

(Witness Excused.)

WILLIAM ROWE called as a witness on the part of the government, being duly sworn, testified as follows:

Direct examination.

By Mr. Robertson:

Q. What is your name?
A. William Rowe.
Q. Where do you live, Mr. Rowe?
A. 820 Osage.
Q. Here in Leavenworth?
A. Yes sir.
Q. Were you at one time connected with the United States penitentiary?
A. Yes sir—a guard.
Q. Sir?
A. As guard, yes sir.
Q. You are not working for the government any more?
A. No sir.
Q. When did you quit working for the United States at the penitentiary here?
A. The last day of November, 1917.
Q. You were there at the time of the occurrence between the defendant Stroud and Mr. Turner?
A. Yes sir.
Q. And when did you begin service with the prison?
A. The first day of October, 1915.
Q. 1915?
A. Yes sir.
650 Q. Can you see this picture from where you are?
A. Not very well.
Q. Stand up—perhaps you better step over here, if you will—you remember some time prior to the occurrence between Mr. Turner and defendant Stroud, of another incident there in which Mr. Turner and you took part?
A. Yes sir.
Q. I don't know whether the jury can see or not—step over here—show to the jury where that took place?
A. It was right about here.
Q. Who did it concern?
A. It concerned a prisoner Kasellis, and Mr. Turner.
Q. All right—now take the chair up there——

Miss La Bar: Can you spell it—Kasellis?

A. No ma'am; it is too much for me.

Q. I wish you would just tell the jury all you know about that occurrence—go ahead?

A. Well, on this morning of this occurrence between Mr. Turner and Kasellis, there was something about the rules that Kasellis never did know what to do to speak to the Captain—he had not secured permission, and he went up anyway, and after the lines had marched out of the dining room, I noticed this Kasellis up to the Captain's desk; and when I came out, I came out right in front of Mr. Turner and I asked him what the trouble was and he said Kasellis had gone up without permission and spoke to the Captain and said——

Q. I don't think you would have a right to say what Kasellis said; you were not there yourself?

A. —I noticed him up to the Captain's desk, after the lines went out, and I walked over to this place I have spoken about.

Q. Over here to the first row of seats?

A. Yes sir.

Q. Where was Mr. Turner while this was going on?

651 A. Standing perhaps about three feet from the prisoner.

Q. What did he do then, in regard to this prisoner?

A. He said something about food——

A. All right?

A. And Mr. Turner spoke to the Captain about it and the Captain said to take him over to the isolation, and Mr. Turner walked in and took hold of his arm to take him over, and as he did that the prisoner grappled with him and in the struggle both went down; I went to his assistance and we just raised the man up and walked him over to the isolation and put him in isolation.

Q. I will ask you whether you saw the whole affair yourself?

Q. Yes sir.

Q. Saw it all?

A. Yes sir.

Q. Did Mr. Turner strike at that man at all?

A. No sir.

Q. With his club or with his fist, or with anything else?

A. No sir.

Q. Simply obeyed an order that the Captain gave him to take him out?

A. Yes sir.

Q. Now, do you know of any similar occurrence of that sort there in the dining room at any other time while you were there?

A. No sir.

Q. Do you know of any such occurrence happening up near the Captain's stand?

A. No sir.

Q. Did you know Mr. Turner pretty well?

A. Yes sir.

Q. Were you there all the time that he way there?

A. No sir, he got there before I did.

Q. Was he there all the time you were there after you came into the service up until his death?
A. Yes sir.
Q. Did you see him daily?
A. Well, nearly every day—yes sir.
Q. You were a guard then, all that time?
A. Yes sir.
Q. And among the men constantly?
A. Yes sir.

652 Q. Did you know what Mr. Turner's reputation was there as a guard as to being gentlemanly and orderly and all those things that go to make up a properly conducted guard—do you know what his reputation was?
A. His reputation was good.
Q. I asked you if you knew?
A. Yes sir.
Q. What was it?
A. Good.
Q. Was Mr. Turner a gigantic man of extraordinary and unusual strength, a great giant?
A. Well, he was not no giant.
Q. He has been described here as gigantic in size, height and build?
A. No, I think he was shorter than myself; I don't think he weighed quite as much as I did.
Q. At that time what was your weight?
A. At that time 222.
Q. What do you weigh now?
A. About 195 or 200, right along in there somewhere.
Q. What is your height?
A. About five feet eleven.
Q. Did you ever measure with Mr. Turner—compare heights?
A. Why, we have been together a great deal, and I always considered myself a little bit taller than he was. I never measured to see.
Q. I will ask you if he was a man that bragged about his physical prowess?

Mr. O'Keefe: That is objected to as immaterial.
The Court: I think you offered some evidence to that effect.
Mr. O'Keefe: I don't remember any—yes we did. I withdraw the objection.
The Court: He withdraws the objection.

Q. You may state what you know about that?
A. What is that?

653 Q. Whether Mr. Turner was a man that went about bragging about his physical prowess?
A. I never knew him to.
Q. Never saw him go through any motions?
A. No sir.

Mr. Robertson: Cross examine.

Cross-examination.

By Mr. O'Keefe:

Q. You say you are about five foot eleven?
A. In that neighborhood.
Q. Do you know that Mr. Turner was about five foot eleven?
A. He was a little bit shorter than me.
Q. Did you hear his wife just testify?
A. No sir.
Q. You say you weighed about 222 at that time?
A. In that neighborhood.
Q. And now about 195?
A. About that—195 or 200, right in there.
Q. As a matter of fact you and Turner traveled together a great deal, did you not?
A. No sir, we never traveled together, no sir.
Q. You two were two of the biggest, strongest guards up there at the prison at that time, weren't you?
A. No sir.
Q. Now, when did you leave the Federal prison?
A. Last day of November, 1917.
Q. Didn't you yourself have trouble with a prisoner about knocking him out or something of that kind—didn't you have trouble with a prisoner and hit him, or something to that effect?
A. Why, I stopped what I considered an attempt at mutiny by striking him.
Q. You hit him with the billy?
A. No sir, with my club.
Q. That is, one of these clubs that the guards have?
A. That is, the regulation club that the guards have?

Mr. Robertson: That is objected to as not proper cross-examination.

The Court: I don't think it is proper cross examination.
654 We necessarily would have to stop and go into the circumstances. This man was a guard, and it was his duty to exercise some sort of control over the conduct of the inmates, and we would necessarily have to inquire whether he passed his privileges and duties as a guard, and if he did, to what extent, and that would not affect his credibility in the way of evidence; it would be a question of very slight degree, if you went through all that, but it is all collateral. The objection will be sustained.

And to this ruling and action of the Court defendant then and there duly excepted and still excepts.

Q. Now, Mr. Rowe, you described the occurrence with this man Kasellis as having taken place near the front of row 1?
A. Row 1, yes sir.
Q. You say the prisoners were then out of the hall?
A. No sir, out of the dining room.

Q. They were all gone?
A. Out of the dining room—yes sir.
Q. Where were you at the time the row started between Turner and Rowe—what part of the room were you in?
A. Turner and who?
Q. Turner and Kasellis—I beg your pardon?

Mr. Robertson: We object to the question as assuming that there was a row, between Turner and Kasellis.

Q. Or trouble—whatever you may call it? Where were you?
A. Standing right in the doorway of the dining room hall and the rotunda.
Q. That would be right in here?
A. Yes sir.
655 Q. Who else was there besides Turner and Kasellis at the time it started?
A. There was not anybody there but Captain Purcell was in the hallway or in the rotunda.
Q. Did this man signal you?
A. No sir.
Q. What attracted your attention to it then?
A. When I heard he was doing the talking, and so I walked over there to be of any service that I might be.
Q. What were they doing at the time your attention was called to it?
A. Just standing there.
Q. And there was no use of clubs or anything of that character?
A. No sir.
Q. When did that occur with reference to the trouble between the guard and the prisoner here?
A. That had taken place previous to that.
Q. How long previous?
A. Well, I could not say.
Q. Well, give us your judgment?
A. I don't know how long previous.
Q. Was it six months before—yes or not?
A. I could not say how long it was previous to that time.
Q. Now, were you present the time when Turner had trouble with Smith, when he was sitting back here in the dining room, at dinner time?

Mr. Robertson: We object to that as assuming that he had trouble with Smith; there is no such evidence in this case.
Mr. O'Keefe: That is my impression; that trouble has been described as trouble between guard Turner and Smith.
The Court: I can't recall any testimony on that subject.

A. No sir, I was not present when any trouble was taking place with Smith.
656 Q. Were you present at any meal time when the prisoners were seated there at the dinner table, when Mr. Turner had trouble with a prisoner on that south aisle?

A. No sir, not with Smith—not with a prisoner by the name of Smith.

Q. Were you present when Turner had trouble with a prisoner during the meal hour when these seats were filled, just about a month before the trouble?

A. Well, I must have been present because I was always present in the dining room during a meal hour.

Q. You didn't see that?

A. No, I didn't see the trouble. The only trouble I saw was the trouble I made a statement of before.

Q. This trouble here?

A. Yes sir.

Q. Were you present at any other trou*lbe* that Turner had with prisoners?

A. No sir.

Mr. O'Keefe: That is all.

(Witness excused.)

JOHN M. PURCELL, recalled as a witness on the part of the government, further testified as follows:

Direct examination.

By Mr. Robertson:

Q. Captain, you know of a prisoner you had there that is sometimes referred to as Kasellis?

A. Yes sir.

Q. Do you know of his being referred to by any other name?

A. I didn't know at that time.

Q. By what other name did you know of him being referred to at any time?

A. I have learned lately that he was referred to as Smith.

Q. Now was there ever any difficulty there say along about a month before this occurrence between Stroud and Mr. Turner, any difficulty with this fellow Kasellis?

A. Yes sir.

Q. Did that occur up near your stand or desk?

657 A. No sir.

Q. Is that the difficulty that you testified to when you were on the stand before?

A. Yes sir.

Q. In which guard Turner put his arms around a man to take him away?

A. Yes sir.

Q. Under whose orders was he acting when he did that?

A. Guard Turner?

Q. Yes?

A. Why, he was acting under his regular instructions, taking a man out for something that occurred in the dining room; I didn't learn the nature of it until afterwards.

Q. You say—now you were very well acquainted with Mr. Turner during his life time?
A. Yes, for the time he was there.
Q. For the time he was there?
A. Yes sir.
Q. Were you acquainted with his reputation while he was there?
A. Yes sir.
Q. Were you acquainted with his reputation as to being a quiet peac-able guard while he was there?
A. Yes sir.

Mr. O'Keefe: That is objected to as not in rebuttal.
The Court: Didn't you introduce that question—the question of his reputation?
Mr. O'Keefe: I will withdraw the objection.

Q. What was his reputation?
A. A good reputation.
Q. There is one more question; you were asked, Captain, upon cross examination when you were on the stand before, about a conversation that it was claimed you had with convict Stratton?
A. Yes sir.
Q. Now, I want to ask you whether, upon that trip between Lorain and Chicago, you discussed Stroud with the man Stratton at all?
A. No sir.
Q. Who was with you on that trip besides Stratton?
A. Guard McGrath.
658 Q. Dennis McGrath?
A. Yes sir.

Mr. Robertson: That is all.

Cross-examination.

By Mr. O'Keefe:

Q. Captain Purcell, where do you now say this trouble with the prisoner occurred?
A. Can I point it out?
Q. Point it out, yes—where you say?
A. They were marching out of the rest of the aisles or sections—had marched out; this aisle got up and started to march out, and it occurred about there. Turner took ahold of him and they scuffled together and partly went to the floor and Turner took hold of him like this and carried him out into the vestibule and I went out there with him and Mr. Rowe and Mr. Turner, and I told them to take him over to the Deputy's office."
Q. What sort of a squabble was there?
A. Kasellis resisted going and Turner took hold of him like that, the club hanging on his arm by the string,—they scuffled and went down, they got up and went out toward the vestibule.
Q. How many times was this man hit on that occasion by the guard?

A. I have been in the United States penitentiary——
Q. Answer my question.
A. He was never hit.
Q. Where were you at the time?
A. I was right at the stand—about ten feet away from the stand, watching the file move out.
Q. Right on the stand?
A. Right about there where your pencil is—right about there.
Q. Did this commotion occur when the prisoners were in their seats or after they were going out?
A. While they were marching out.
Q. How many were there in there at the time—he was not
659 the last that went out, was he?
A. No.
Q. How many were in there at the time?
A. Six times forty is two hundred and forty men—probably 220 men.
Q. 220?
A. Yes sir, standing up and going out.
Q. You remember the occasion of guard Turner knocking a prisoner down at the quarry just previous to this?
A. No sir.
Q. You don't remember that?
A. No sir.

Mr. O'Keefe: That is all.

(Witness excused.)

J. L. TUCKER, called as a witness on the part of the government, being duly sworn, testified as follows:

Direct examination.

By Mr. Robertson:

Q. What is your name?
A. J. L. Tucker.
Q. Where do you live?
A. I live in Atlanta, Georgia.
Q. What official position if any do you hold with the United States at Atlanta, Georgia?
A. I am Captain of the Watch at the United States penitentiary.
Q. At Atlanta?
A. At Atlanta.
Q. Were you acquainted with the deceased Andrew F. Turner during his life time?
A. I was.
Q. Was he a guard at the Atlanta penitentiary for a time since you have been there?
A. Yes sir.
Q. How long have you been with the institution, Captain?

A. Sixteen years.
Q. Were you there all the time Mr. Turner was there?
A. Yes sir.
Q. What capacity was he employed in while he was there?
A. As a guard.
Q. Was he under your observation all the time he was there?
A. Yes sir.
660 Q. You were Captain of the Watch all the time he was there?
A. Yes sir.
Q. Do you know what his reputation was there as to being a peac-able, orderly gentlemanly well conducted guard—answer that yes or no?
A. Yes sir.
Q. What was that reputation, good or bad?
A. It was good.

Mr. Robertson: Cross examine.

Cross-examination.

By Mr. Kimbrell:

Q. Do you recall some young fellow dying after an encounter with Mr. Turner, and there was some question made about it, some investigation? You recall that, do you?
A. I do not.
Q. What is that?
A. I never heard of it, don't know anything about it.
Q. Do you remember some inmate there, some prisoner, after a scuffle or a fight with guard Turner, died—the prisoner's name, it is suggested, was Moore—and that there was some investigation of guard Turner's conduct in reference to his treatment of that prisoner—you remember that don't you?
A. No sir.
Q. Never heard of it?
A. No sir.
Q. Did you ever hear of a prisoner named Moore being in a fight with a guard, and later dying from the effects of the fight?
A. No sir.
Q. Nothing of that kind ever happened there?
A. No sir.
Q. All the guards were of good reputation?
A. Mr. Turner was.
Q. That was true of all the guards, wasn't it—and his was about like that of other guards, wasn't it?

Mr. Robertson: That is objected to.
The Court: Sustained; the witness need not answer the
661 question.

And to this ruling and action of the Court defendant then and there duly excepted and still excepts.

Q. You still say that Mr. Turner's reputation was good?
A. Very good—yes sir.
Q. Do you recollect that an investigation of the charge was made that some guard there had been instrumental in bringing about the death of that boy, Moore?

Mr. Robertson: That is objected to as immaterial.
The Court: You may inquire relating to Turner's connection, but not some other guard.

And to this ruling and action of the Court, defendant then and there duly excepted and still excepts.

Mr. Kimbrell: If the investigation was made we might not be able to show by this witness Mr. Turner's connection, but we might by others?
The Court: Do you now say you have any proof of that?
Mr. Kimbrell: No, this is the only witness I know of from there.
The Court: Very well; objection sustained.

And to this ruling and action of the Court defendant then and there duly excepted and still excepts.

(Witness excused.)

F. G. ZERBST, called as a witness on the part of the government being duly sworn, testified as follows:

Direct examination.

By Mr. Robertson:

Q. What is your name?
A. F. G. Zerbst.
Q. Mr. Zerbst, what official position, if any do you hold
662 with the United States?
A. Warden of the United States penitentiary at Atlanta, Georgia.
Q. Did you have in your employ as a guard one Andrew F. Turner prior to his being transferred to the United States penitentiary at Leavenworth?
A. Yes sir.
Q. Did you know him well, personally?
A. Yes.
Q. Did you know his reputation there for being a gentlemanly, orderly man, conducting himself as such a guard should under your rules and regulations?
A. I do.
Q. Was that reputation good or bad?
A. That reputation was good.

Mr. Robertson: You may examine.

Cross-examination.

By Mr. O'Donnel:

Q. How long have you been Warden?
A. Four years and seven months—or Four years and three months—pardon me.
Q. You were at this prison before you went down there?
A. Yes sir.
Q. Did you know Harry Ferguson, a prisoner that was in the penitentiary at Atlanta, in June, 1915?
A. I don't recall him.
Q. Do you recall that a man named Harry Ferguson died in the Atlanta penitentiary on June, twenty-first, 1915?
A. I don't recall it—no.
Q. Was guard Turner in that penitentiary in June, 1915?
A. Guard Turner left the service of the Atlanta penitentiary on June 15, 1915.
Q. Yes sir—and isn't it a fact that six days after guard Turner left, a man named Harry Ferguson died of a fractured skull that he received before you transferred Mr. Turner to this place?
A. I don't recall any such thing.
663 Q. Do you recall a young man named Ferguson dying down there with a fractured skull?
A. I do not.
Q. You didn't tax your memory with that, Mr. Zerbst?
A. No sir; I would not say it is impossible.
Q. You would not say that is impossible?
A. No sir.
Q. You would not say that it didn't happen?
A. I would not say that such a man didn't die there.
Q. You would not say that he didn't die of a fractured skull, Mr. Zerbst?
A. No, I would not say that.
Q. And you would not say now at this time that that fractured skull did not result from the contact with a guard's club?
A. Yes, I would say that was not the case.
Q. At any rate, you have no recollection of that occurring?
A. I don't recollect any such occurrence.
Q. How many prisoners do you have down there?
A. Something over 1,500.

Mr. O'Donnell: That is all.

(Witness Excused.)

THOMAS W. MORGAN, recalled as a witness on the part of the government, further testified as follows:

Direct examination.

By Mr. Robertson:

Q. Were you personally well acquainted with Mr. Turner when he was in your employ there as guard in the institution?

A. I was.

Q. Yes sir—and were you acquainted with his standing and reputation there at the institution as a guard, that is, upon the question of whether he was orderly gentlemanly and conducted himself as a guard should?

A. I was.

Q. What was that reputation, good or bad?

A. *Ti* was good.

Mr. Robertson: Cross Examine.

664 Mr. Kimmell: No questions.

(Witness excused.)

Dr. A. F. YOHE, recalled as a witness on the part of the government, further testified as follows:

Direct examination.

By Mr. Robertson:

Q. Dr., have you with you your record, hospital record of defendant Stroud?

A. Yes sir.

Q. Did you have there under you a convict named Darnell from the early part of July, 1915, to the early part of January, 1916?

A. I don't recall the dates; I had the man.

Q. You had the man during such period of time as he was there?

A. Not for all of his time, but for the period he was assigned to the hospital.

Q. I am referring now not to the dates that he served in the prison, but when he worked for you?

A. He worked for several months in the hospital, the dates I do not recollect.

Q. He gave them here as from July to in December—I wish you would turn to your record, the hospital record of the defendant Stroud—unless you have it in your memory?

A. Not the exact dates.

Q. For the month of July, 1915, and advise us whether you had Stroud in the hospital for observation or anything else during that month?

A. ——.

Mr. O'Donnell: I would like to ask a question.

Questions by Mr. O'Donnell:

Q. Doctor, did you keep those records—did you write up the records?
A. No sir.
Q. Who did that?
A. My clerks.
Q. Do you recall the name of the clerk?
A. I don't recollect the name of the clerk.
Q. Well, wouldn't the records of the institution show who
665 your clerks were?
A. I don't think it would.
Q. Well, were the clerks prisoners or civilians?
A. Prisoners.
Q. Men detailed for that work?
A. To do that specific work, yes sir.
Q. Don't you think that the records of the prison would show the particular work of any particular prisoner in the institution at any particular time—you kept a record?
A. The fact that the man was detailed to my department would be on record in the deputy's office.
Q. So that it is possible to get the name of the clerk, the man you had for clerk at that time, by reference to the deputy's records?
A. Yes sir.

Questions by Mr. Robertson, resuming:

Q. Doctor, are these records made under your direction and supervision?
A. Directly, yes sir.
Q. I will ask you whether or not you don't have an independent personal recollection of this particular man, Stroud?
A. I do; and have.
Q. Did you have him in the hospital during the month of July, 1915?
A. No sir.
Q. Did you have him in the month of August, 1915, and if so, for how long?
A. From August 9th to the 28th.
Q. From August 9th to the 28?
A. 1915.
Q. Constantly during that period?
A. Yes sir.
Q. What did you have him for?
A. Chronic nephritis.
Q. Explain to the jury what that is?
A. Chronic inflam-ation of the kidneys.
Q. I will ask you whether from the 28th day of August, 1915, until now he has ever been in the hospital for anything?

666 A. He has never been in the hospital.
Q. Since then?
A. No sir.
Q. Did you ever have him in the hospital for the purpose of observing his mental condition?
A. No sir.
Q. Was that ever suggested to you by anybody?
A. No sir.
Q. Did you observe him at any place upon any question of any mental deficiency?
A. Only general observation by my daily visits after he was placed in isolation.

Cross-examination.

By Mr. O'Donnell:

Q. Did you ever make any observations of him?

The Court: This is not rebuttal—what he did. This can only be admitted for the purpose of rebuttal. There is not any evidence here upon which an issue of excusable homocide could be submitted to this jury on the ground of insanity.
Mr. O'Donnell: There is not any proof of that.
Mr. Robertson: I cannot understand what else they undertook to offer it for.

Redirect examination.

By Mr. Robertson:

Q. I will ask you to state to the jury, if you can, Doctor, when the nephritis was cleared up and defendant discharged?

Mr. O'Donnell: That has been gone over on his direct examination.
Mr. Robertson: I believe he did—on the 28th of August I believe he said—that is all.

(Witness Excused.)

The prosecution here rested its case in rebuttal.

667 Mr. O'Donnell: If the Court will permit me: I wish to offer in evidence the mandate of the Court of Appeals filed in this Court, transmitted from the Court of Appeals to this court in the month of December, 1916, and also the assignment of errors at the term of this court in June or thereabouts, 1916, and also the first bill of exceptions filed in this court in the summer of 1916; and I make this offer for the purpose of showing to this court that this cause was once determined by the appellate court upon the same sort of transcript and the same indictment as that now before the court, and that the matters now is issue were then adjudicated; and

I move that upon that record the court instruct the jury that the defendant is not guilty.

(Clerk will here copy: the assignment of errors filed in this court after the conviction of defendant at the Special May, 1916, term of this court, and also the mandate of the United States Circuit Court of Appeals for the Eighth Circuit, filed in this court in December, 1916.)

Mr. Robertson: The offer is objected to as being irrelevant, incompetent and immaterial, and besides, untimely.

The Court: Objection sustained on the first ground: and an exception to defendant entered.

And to this ruling and action of the Court the defendant still excepts.

The defendant here rested his case.

Evidence closed.

668 And thereupon, the jury having heard the arguments of counsel, defendant's counsel submitted to the court in writing and asked the court to give to the jury the following instructions in the nature of demurrer to all the evidence in the case, to-wit:

I.

The defendant hereby requests the court to give to the jury on his behalf the following instructions, which request is made separately as to each thereof:

B. F. ANDRES,
JOHN T. O'KEEFE,
Attorneys for Defendant.

II.

Now at the close of all the evidence the defendant requests the court to charge the jury as follows:

The court instructs the jury that under the indictment and the evidence, you must find the defendant not guilty.

III.

Now at the close of all the evidence the defendant requests the court to charge the jury as follows:

The court instructs the jury that under the indictment and the evidence, you must find the defendant not guilty of murder in the first degree.

IV.

Now at the close of all the evidence the defendant requests the court to charge the jury as follows:

The court instructs the jury that under the indictment and the evidence, you must find the defendant not guilty of murder in the second degree.

V.

Now at the close of all the evidence the defendant requests
669 the court to charge the jury as follows:

The court instructs the jury that under the indictment and the evidence, you must find the defendant not guilty of manslaughter.

(Endorsed by the Court:)

Defendant's Requests refused.

LEWIS, *Judge.*

(Marked:) Filed June 28, 1918. F. L. Campbell, Clerk.

Which instructions and each and every thereof were by the court refused, and to the action and ruling of the court in refusing to give to the jury the said peremptory instructions asked by the defendant and to each of such rulings in refusing to give each of such instructions asked, defendant then and there duly excepted and still excepts.

670 The Court gave to the jury the following instructions, to-wit:

Gentlemen of the Jury, the Court wishes to thank you for the commendable attention that you have given to all the proceedings in this case. It is evident that you have listened with care to the testimony of the witnesses and to the arguments of counsel, both for the prosecution and the defendant. The oppressive weather which has existed during the continuation of this trial has rendered your duty unreasonably and unusually burdensome on that account.

You have heard the testimony in the case. You have had the benefit of able counsel, both for the government and the defendant, in presenting to you in every light possible that may have occurred to them the different facts and circumstances surrounding the occasion on which Guard Turner lost his life; and under the proceedings of law the only thing now remaining to be done before the case is submitted to you for your final consideration is that the court declare to you the principles of law by which you shall be guided in this case in reaching your verdict.

You have already been advised through the progress of the trial that the defendant, Robert F. Stroud, is on trial under an indictment found by a United States Grand Jury charging him with having committed the crime of murder. That crime as charged against the defendant in this indictment is defined by an act of Congress, and it becomes the duty of the court, in order that you may understand-
ingly determine whether or not the defendant is guilty as
671 charged, to explain and instruct you as to the elements required to constitute the crime of murder.

This indictment charges that the defendant, Robert F. Stroud, on or about the twenty-sixth day of March, 1916, in the County of Leavenworth, State of Kansas, and at and within the prison walls of the United States penitentiary at Leavenworth, Kansas, a place then and there and theretofore and ever since being under the exclusive jurisdiction of the United States, did then and there knowingly, wilfully, purposely, unlawfully, feloniously, deliberately, premeditatedly and of his malice aforethought with the intent to kill and murder one Andrew F. Turner make an assault upon him, the said Andrew F. Turner, with a certain deadly weapon, to-wit, a certain knife with a sharp edge and pointed blade several inches in length, which he, the said Robert F. Stroud, in his hand then and there had and held, and did, then and there unlawfully, wilfully, purposely, feloniously, deliberately, premeditatedly, and of his malice aforethought, with the intent as aforesaid to kill and murder said Andrew F. Turner, strike, cut, stab and wound the said Andrew F. Turner at, upon, and in the body and breast of him the said Andrew F. Turner, then and there and thereby giving to him, the said Andrew F. Turner, in and upon the body and breast of him, the said Andrew F. Turner, one mortal wound of the width of about one inch and of the depth of about five inches, from which said wound he, the said Andrew F. Turner, did then and there instantly die. And the Grand Jurors aforesaid, upon their oaths aforesaid, do further find, charge, and present that at the time and place and in the manner and by the means aforesaid the said Robert F. Stroud him, the said
672 Andrew F. Turner, did then and there purposely, knowingly, wilfully, unlawfully, feloniously, deliberately, premeditatedly and of his malice aforethought kill and murder, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Now the finding of this indictment by the Grand Jury is no evidence of the guilt of the defendant. It is a legal charge against him of having committed that crime. To that charge he has pleaded, not guilty, and that created the issue which you are called here to determine. That indictment is based upon the act of Congress which provides that crimes and offenses defined in this chapter shall be punished as herein prescribed. When committed within or on any land reserved or acquired for the exclusive use of the United States and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States, by consent of the legislature of the state in which the same shall be, for the erection of a fort, magazine, arsenal, dock yard or other needful building, they come within the jurisdiction of the United States, if thus committed at those places, they are subject to indictment and prosecution in the courts of the United States. And you are instructed that under the acts of Congress and under the acts of the state legislature the United States penitentiary at Leavenworth, Kansas, is a place exclusively within the jurisdiction of the United States, and that the crime of murder, or any other crime, committed in that institution is subject to prosecution only in the courts of the United States.

This statute further provides: Murder is the unlawful killing of a human being with malice aforethought, and every wilful,
673 deliberate, malicious and premeditated killing is murder in the first degree; and any other murder is murder in the second degree. So that, in the definition of murder as declared by the act of Congress, we come to this: that a deliberate, premeditated, wilful murder, with malice aforethought, is murder in the first degree. If committed, however, without the element of deliberation, it is then reduced to murder in the second degree. I repeat, if in the act of the killing there be upon the part of the defendant premeditation, deliberation and malice aforethought, it constitutes murder in the first degree. If in the act of killing there is only premeditation and malice aforethought and no deliberation, then it is murder in the second degree. Those terms, premeditation, deliberation and malice aforethought, the court will have occasion to define to you later on. If premeditation, deliberation and malice aforethought are absent, and do not exist, and are not found by the jury to be an element of the killing, but that the killing was brought about in a heat of passion upon the part of the defendant in a sudden quarrel, then the act does not constitute murder at all, but under the statute of the United States is what is defined as voluntary manslaughter. The statute continues: Every person guilty of murder in the first degree shall suffer death. In all cases where the accused is found guilty of the crime of murder in the first degree, the jury may qualify their verdict by adding thereto, "without capital punishment," and wherever the jury shall return a verdict qualified as aforesaid, without capital punishment, the person convicted shall be sentenced to imprisonment for life. Every person guilty of murder in the second degree shall be imprisoned not less than ten years, and may be imprisoned for life. Every person guilty
674 of voluntary manslaughter shall be imprisoned not more than ten years.

Now the court is not the judge of what the facts are in the case. That is for the jury to determine. The court is required, in advising you as to what the law is by which you shall be guided in reaching a verdict, to instruct you on all phases of the testimony. It makes no difference whether, in the mind of the court, the evidence is convincing or not convincing upon a particular phase, because that is a question for you to determine. If there be evidence on which two or three or more possible conclusions might be arrived at, it becomes the duty of the court in instructing the jury to cover all of those different phases as disclosed by the testimony in the case. Therefore, it is the duty of the court in this case to instruct you as to the law on murder in the first degree, on murder in the second degree, and on voluntary manslaughter.

The defendant is presumed to be innocent of each and all of these crimes embodied in and charged against him in this indictment. And that presumption of the law abides with him as a shield of protection until it is overcome by the evidence in the case convincing you of his guilt beyond a reasonable doubt. And that guilt is not established until the evidence thus convinces you that all of the

elements going to make up the particular crime have been established to your satisfaction beyond a reasonable doubt. And therefore, it becomes necessary before you can convict the defendant of murder in the first degree to know what the different terms in the definition of that crime mean and signify in the law, and I proceed now to define them to you.

675 Premeditatedly, as used in the statute and in the indictment, means that the particular crime charged against the defendant was thought of by him beforehand, before he struck the fatal blow, if he did strike it, for any length of time, however short. Deliberately, as used in the statute and in this indictment, as an element of murder in the first degree means that the defendant at the time he is charged with having committed the crime was in a cool state of the blood. It means an intent to kill executed by the defendant in a cool state of the blood and not done under the influence of a violent passion, suddenly aroused by some provocation. The word, Malice, as used in this statute and in this indictment as constituting an element in murder in both the first and second degree, means that condition of the mind which prompts one to take away the life of a fellow creature without just cause or excuse, and it signifies a heart regardless of social duty and fatally bent on mischief. Malice aforethought, means that the act was done with malice and premeditation.

In addition to the defendant's general plea of not guilty in this case, he interposes the special plea of justifiable homicide. That is, that he was justified, if you find that he killed Turner, in so doing. And he bases that plea upon the ground that it was necessary for him at that time to take the life of Turner in defense of his own person. And on that plea the court declares the law to be, and you are instructed, that if you believe from the evidence that at

676 the time the defendant, Stroud, stabbed and killed Turner he had reasonable cause to apprehend a design on the part of Turner to take his life, or to do him some great bodily injury, and that there was reasonable cause for him to apprehend immediate danger of such design being accomplished, and that to avert such danger he stabbed Turner, and at the time he stabbed him he did not act in a spirit of revenge, but that he had reasonable cause to believe, and did believe, that it was necessary for him to stab and kill Turner to protect himself from such apprehended danger, then the jury should acquit the defendant of all of these offenses charged against him on the ground of self-defense. You observe that it is not necessary in the plea of self-defense that the danger should have been actual or real or impending or about to fall; all that is necessary is that the defendant had reasonable cause to believe, and did believe, these facts to then and there exist. On the other hand, it is not enough that the defendant should have so believed; he must have had reasonable cause to so believe. Whether or not he had reasonable cause to so believe is for the jury to determine under all these facts and circumstances given in evidence. If the jury believe from the evidence that the defendant did not have reasonable cause to so believe, you cannot acquit him on the ground of self-defense, although

you may believe the defendant was in fear and thought he was in danger. Now the sum and effect of that principle of law, gentlemen of the jury, is this: that if one man attack another with a deadly weapon, and from the circumstances it appear that the one attacked believed and had reasonable cause to believe that some great bodily harm would be inflicted upon him, he can exercise the
677 right in defense of his own person to take the life of his assailant on the ground of self-defense, and the law acquits him. As to whether or not he so believed and had reasonable cause to so believe, is for the jury to determine from the facts in the case when he is brought to trial. And on this defense I call your attention to the fact that it appears in evidence in this case on the part of some of the defendant's witnesses that the deceased, Turner, drew his club on the defendant, that the defendant grabbed it once or twice, and struggled over it, and that thereupon the deceased did raise it as if to strike the defendant, and that while the club was thus in the air the deceased struck the fatal blow. If that testimony is accepted by you as being the true facts on that occasion, and you believe from those facts that the defendant believed and had reasonable cause to believe he was being threatened with immediate personal injury, then he had a right to strike down Turner in defense of his own person, and the law in that respect is the same within the prison walls as it is upon the streets of Leavenworth. But the question for your determination on that plea and that principle of law is, whether or not you will accept the testimony of the defendant's witnesses as disclosing the true facts at that time.

The government offered testimony that when the defendant accosted Turner in the aisle, Turner was walking with his club under his left arm and his hands behind him; that when the defendant spoke to him, he nodded his head as if in assent, and that thereupon,
678 immediately, there was a quick thrust by the defendant with his left hand at the breast of Turner; thereupon Turner straightened up and feebly attempted to draw his club, when the defendant took hold of it with one hand, and then Turner sank to the floor dead. And in that connection, in determining whether or not Turner first made the assault upon Stroud with his club, you will consider not only all of the testimony by all of the witnesses in the case, both on behalf of the government and on behalf of the defendant, but you will likewise consider the descriptions of that occasion by the defendant in his letters written but a few days after the tragedy.

But if the jury further find and believe from the evidence that the defendant, Stroud, sought to have a conversation or controversy with Turner about his having been reported by Turner for violating the prison rule, in order that he, Stroud, might thereby provoke Turner into a quarrel with him, so that he, Stroud, would have an opportunity of stabbing and killing Turner with the dagger concealed in his coat, and that this purpose and intent was in the mind of Stroud when he spoke to Turner, then there is no self-defense in this case, even although you may believe that Turner during the controversy drew and lifted his club into a position as if he intended

to and was about to strike Stroud with it. And that principle of law, gentlemen, in ordinary illustration is this: if A deliberately makes up his mind that he is going to kill B, arms himself with a deadly weapon for that purpose and then seeks B out in order to have a quarrel with him so that it will give A an opportunity to kill
679 B, and he does provoke him into a quarrel for that purpose, and thus having drawn B into the quarrel or conversation for the purpose of killing him, he thereupon strikes him down, there is no self-defense in the law under those circumstances for A, although before the fatal blow was struck he had so provoked B that B, threatened him with a deadly weapon. Now it is for you to determine whether or not that was the situation in this case. If it was, and you so conclude from the evidence beyond a reasonable doubt, then you wipe away the plea of self-defense in this case. And I submit that instruction and that principle in law and that question to you, because there was proof testified to by witnesses upon this stand, one of them I believe a guard at the prison, that Stroud afterward told Jones, who was at that time under a charge of murder, that he determined Saturday night that he would kill Turner on Sunday; that he knew about where he, Stroud, would sit at the table, and where Turner would be in the aisle. And in connection with that testimony you can likewise, for the purpose of determining that question, consider the fact, if it be a fact, that Stroud went to that Sunday dinner with a deadly weapon concealed in his coat.

So much as to the law, gentlemen of the jury, on the two phases as developed by the testimony of the plea of self-defense.

Now, gentlemen of the jury, I have referred to some of the testimony in this case. I have not done so with any purpose of having you understand that the court wants to bind you to find any
680 particular facts in reference to this case. I only direct your attention to the fact that such testimony was given in order that you may have it in mind in connection with a consideration of the plea of self-defense. The court, indeed, has a right under the law to tell you what the court thinks the facts are. I do not care to do that. You would not be bound by what the court told you the facts were unless they agreed with your own judgment as to what the facts are, and if you, under your oaths, believe the facts to be otherwise than stated by the court, if the court did state the facts as it understood them, it would be your duty to disregard what the court thought the facts are, and under your oaths and on your own responsibility determine for yourselves what the facts are. That is the duty that the law imposes upon you as jurors, and for the time being, as officers of this court, in the administration of justice.

So, gentlemen of the jury, if you should find that the plea of self-defense as defined by these instructions has been made out, you would have to acquit the defendant entirely of all crimes charged in the indictment; or if the evidence on that defense raises a reasonable doubt in your mind as to his guilt, he would be entitled to the benefit of that doubt and in that event you would have to acquit. But if you find from the evidence in this case that the plea of killing Turner in self-defense is not sustained, then it will be your duty to again

consider and determine whether or not the defendant is guilty of murder in the first degree. If not murder in the first degree, whether or not he is guilty of murder in the second degree. If not guilty of murder in either degree, is he guilty of voluntary man-
681 slaughter. And if not guilty of any of those offenses, you should find him not guilty.

Now, if you find and believe from the evidence in this case beyond a reasonable doubt that the defendant, at the United States prison near Leavenworth, feloniously, unlawfully and wilfully, that is intentionally, not accidentally, premeditatedly, deliberately, and of his malice aforethought, killed and murdered Andrew Turner, then it will be your duty to return a verdict against him of murder in the first degree.

If, on the other hand, you do not find the element of deliberation exists in the case, but believe from the evidence beyond a reasonable doubt that the defendant feloniously, unlawfully, wilfully, premeditatedly, and of his malice aforethought, but without deliberation as heretofore defined, killed and murdered Andrew Turner, you will in that event find him guilty of murder in the second degree, and so state in your verdict.

If you do not find that the act was done by the defendant, if he did do it, in the killing of Turner, with malice aforethought, with deliberation, and with premeditation, but that he killed Turner while in a heat of passion aroused by a sudden quarrel, and that the quarrel was not brought on for the purpose of seeking an opportunity on the part of the defendant in which to kill Turner, then in that event, you will find him guilty of voluntary manslaughter, and so state in your verdict.

The court is the judge of the law in the trial of this case. The jurors are the judges of the facts in this case.

682 You take the law from the court; you take the facts from the witnesses upon the stand, and after considering all of their testimony and all of the circumstances surrounding the case, you determine what the true facts are; and then, putting this law as given to you by the court alongside, and as a measure, upon the facts, you reach your verdict; the verdict that the law demands, and that you, under your oaths, bound yourselves to render, a verdict according to the law and the evidence in this case. And that is the only duty this jury and this court sit here to discharge. We are not here to punish anybody or to befriend anybody unless it be at the command of the law under the facts that punishment be administered. We are not concerned with what others might think the verdict ought to be. We are here to administer justice and to reach a verdict in this case under this evidence that has been offered before you and within these principles of law that I have declared to you.

Now it being your province and your duty to ultimately determine what the facts are in this case, it necessarily follows that you are the judges of the weight that you will give to the testimony of each of these witnesses that went upon this stand. You determine how far and to what extent you will credit their statements. You

cannot do this capriciously. You cannot shut your eyes to any witness and say, we will not consider you, we will remove your testimony from this case. It is your duty, conscientiously
683 and fairly to consider the testimony of each witness, but you do not have to accept what he states as being the true facts unless you believe from all the other testimony and circumstances in this case he has testified to the truth. And therefore, in determining how much credit you will give to each witness, and how much weight you will accord to his testimony, you will take into consideration his character, whether or not he appears to be a man worthy of belief, his intelligence, his record, his past record, if it has appeared in this case, as an upright law abiding citizen, his interest if any in the result of this trial, his prejudices either against the United States or against the defendant, or against anyone connected with this case, his disposition, so far as you are able to determine, to tell the truth as he knows it to be, his appearance to you upon the witness stand; and with all of these guides and opportunities that have been given you, you determine how much weight you will give to the testimony of each witness in the case. And if you should find and believe from the evidence in this case that any witness has wilfully sworn falsely to any material fact, then after considering his evidence, you may wholly disregard it as though it had not been given, except in so far as he may be corroborated by other witnesses and other facts and circumstances in the case.

The court instructs the jury that, while the statutes of the United States provide that the person charged with crime may testify in his own behalf, he is under no obligation to do so, and the statute expressly declares that his failure to testify shall not create any
684 presumption against him. The jury should decide the case with reference alone to the testimony actually introduced before them, and without referring to what might or might not have been proved if others had testified.

You have been instructed, gentlemen of the jury, that you cannot convict the defendant of any of the crimes charged against him unless and until you believe from the evidence beyond a reasonable doubt that he is guilty. But a reasonable doubt does not mean a mere possibility of innocence. It means a doubt arising out of the evidence in the case or lack of evidence. If, after a fair, impartial and dispassionate consideration of all of the evidence and of all of the facts and circumstances in this case, you cannot say to yourselves under your oaths that you are satisfied of the defendant's guilt, then you have a reasonable doubt and must acquit him on that ground. But if after you have given all of these facts, circumstances and testimony in the case a fair, honest, impartial and dispassionate consideration, you can then say to yourselves, under your oaths, that you have an abiding conviction that the defendant is guilty, then you have no reasonable doubt, and in that event you must return a verdict of guilty against him.

Counsel may take their exceptions.

Mr. O'Donnell: If the court please, the defendant excepts to the charge of the court, in that it has partially stated the evidence tend-

ing to substantiate the issue of self-defense, and has omitted
685 testimony of Miss La Bar showing that Mr. Whitlatch and Mr. Beck testified at the first trial that the defendant had a struggle with the club, and also the testimony of Mr. Pollard showing that it was an angry altercation between the deceased and the defendant.

The Court: I have looked over the testimony of Whitlatch before instructing this jury. Has the counsel for the government any suggestions on the charge that it might now be corrected if in error?

Mr. Robertson: No, I think of nothing, your honor, to suggest.

The Court: The jury will be given forms of verdict. You will use one of these forms when you have reached your verdict. The first form finds the defendant guilty of murder in the first degree without any recommendation as to punishment. The second form finds the defendant guilty of murder in the first degree, but adds the clause, "without capital punishment." The third form finds the defendant guilty of murder in the second degree. The fourth form finds the defendant guilty of voluntary manslaughter. The fifth form finds the defendant not guilty of all the charges.

When you have agreed upon which verdict you will reach, your foreman, whom you will select from your number, will sign that verdict, and you will then return your verdict into court. The bailiff will take the jury. The jury may also have the indictment.

686 To each and every part of which charge of the court defendant then and there duly excepted and still excepts.

And the defendant submitted to the court in writing and asked the court to give to the jury the following instructions, to-wit:

Defendant hereby requests the court to give to the jury on his behalf the following instructions, which request is made separately as to each thereof.

KIMBRELL AND O'DONNELL,
B. F. ENDRES,
JOHN T. O'KEEFE,
Attorneys for Defendant.

1. You are instructed that if, after a full consideration of this case, you entertain a reasonable doubt as to which degree of crime, if any, the defendant is guilty you should find him guilty of the lesser degree.

2. Deliberately means in a cool state of the blood. It means an intent to kill executed by the defendant, in a cool state of the blood and not under the influence of a violent passion, suddenly aroused by some provocation.

3. If you shall believe from the evidence, beyond a reasonable doubt, that the defendant, at the time and place mentioned in the indictment, with a dangerous and deadly weapon, to-wit, a dagger or knife, wilfully, premeditatedly, of his malice aforethought, but

without deliberation, killed deceased, then you will find him guilty of murder in the second degree.

687 4. If you believe from the evidence that the defendant killed deceased, while the defendant was in a violent passion, suddenly aroused by reason of deceased having attempted to strike or strike at defendant with his club, and that the deceased at the time was within striking distance of defendant, then you cannot find defendant guilty of murder in either degree, for in that case the law presumes that such killing was not done of defendant's malice but by reason of such passion. On the other hand, although you may believe that defendant killed deceased while in a violent passion, suddenly aroused by deceased striking at or attempting to strike a blow at defendant, yet if you shall further believe, from the evidence, that such killing was not done in self defense, you will find defendant guilty of manslaughted only, as that degree of homocide has been defined to you.

5. If you shall believe from the evidence that defendant killed deceased while he, the defendant, was in a violent passion suddenly aroused by quarrelsome or abusive words spoken by deceased to defendant, then such killing wa snot done with deliberation, and was not murder in the first degree. On the other hand, although defendant killed deceased while the defendant was in a violent passion, suddenly aroused by quarrelsome or abusive words, spoken to him by deceased, yet if such killing was done wilfully, premeditatedly, and of his malice aforethought, then defendant was guilty of murder in the second degree.

6. You are further instructed that before you are justified
688 under the laws of the United States in deciding that the defendant, Robert Stroud, did commit the crime of murder and before you are justified in convicting him, you and each of you must believe beyond all reasonable doubt from all the evidence presented to you that he did so in the manner specified by the acts stated in the indictment.

7. The court further instructs the jury that the law of self-defense is fully and amply recognized by the laws of the United States and should be given full and generous consideration by the jury.

8. The court instructs the jury that the right of self-defense is a right derived from nature. To repel force by force is the common instinct of every creature which has means of defense. Sudden and strong resistance to unright-ous attack is not merely a thing to be tolerated, but in many cases it is a moral duty. If an assault is made upon one it may be repelled by force sufficient for self-defense and if the assault is of such a nature as to afford to the person assaulted reasonable ground to believe that the design of the person assaulting him is to destroy his life or to perpetrate upon him great bodily harm the law excuses him if he resists the assault even though he kill his assailant.

9. The right of self-defense is founded upon the law of nature, and is not superceded by the laws of society. It is a right which every one brings into society and retains in society except so far as the laws of society have curtailed it. Every man has a right to defend himself against an attack, threatening him with death
689 or serious bodily harm. The right is based upon necessity and arises where one manifestly intends and endeavors by violence or surprise to commit a known felony on the person, habitation, or property of another. It is a defense against a present unlawful attack as where an assault is made with a deadly weapon.

10. In the defense of one's self, the law respects the passions of the human mind and when external violence is offered to a man himself or to those to whom he bears a near connection the law makes it lawful for him to do for himself that immediate justice to which he is prompted by nature to do for himself and which no prudential motives are strong enough to restrain. It considers that the future process of law is by no means an adequate remedy for injuries accompanied with force, since it is impossible to say to what wanton lenghts of cruelty outrages may be carried, unless it were permitted a man immediately to oppose one violence with another.

11. The law of self-defense does not require one whose life has been threatened to leave his house or secrete himself to avoid his foe. When a person, without fault, is in a place where he has a right to be, is violently assailed he may without retreating repel force by force in the reasonable exercise of his right of self-defense. If not the aggressor he is not obliged to retreat, from an assailant armed with a deadly weapon.

12. You are instructed that if after hearing all the evidence in this case and the instructions of the court you entertain a reasonable doubt as to whether or not the defendant, Robert Stroud,
690 struck the fatal blow from necessity or self-defense, if you find that he did strike such blow, you cannot convict the defendant.

13. You are further instructed that in applying the law of self-defense to the facts and evidence adduced upon the trial of this case you are to judge the defendant, Robert Stroud, upon the facts as they appeared to him.

14. You are further instructed that if upon the whole of the evidence adduced, the jury as a whole or any single member of the jury entertain a reasonable doubt as to whether or not it appeared to Robert Stroud, that it was necessary for him to strike the fatal blow, in order to save his life or save himself from great bodily harm, if you find that he did strike such blow, you should not convict.

15. The court further instructs the jury that in law, the accused is always presumed to be innocent until his guilt is established by competent evidence; and to authorize a conviction, such guilt must

be established beyond a reasonable doubt, a mere preponderance of evidence is not sufficient.

16. The jury are instructed, that mere probabilities are not sufficient to warrant a conviction, nor is it sufficient that the greater weight or preponderance of the evidence supports the allegations of the indictment; nor is it sufficient that upon the doctrine of chances it is more probable that the defendant is guilty. To warrant a conviction of the defendant in this case, he must be proven to be guilty so clearly and conclusively that there is no reasonable theory upon which he can be innocent.

17. The court instructs the jury, that while the statutes of
691 the United States provide that the person charged with crime may testify in his own behalf, he is under no obligation to do so, and the statute expressly declares that his failure to testify shall not create any presumption against him. The jury should decide the case with reference alone to the testimony actually introduced before them, and without referring to what might, or might not, have been proved if others had testified.

18. The court instructs the jury that in order to fairly determine whether the defendant is proven guilty of the crime, in the manner and form as charged in the indictment, beyond any reasonable doubt, as the law requires, the jury should take into consideration all the evidence elicited from the defendant's witnesses, as well as that detailed for the prosecution; and if after a full and dispassionate consideration of all the evidence in the case, you still entertain any reasonable doubt as to whether the defendant committed the crime in manner and form as charged in the information, then you should acquit the defendant, and it is your duty not to find him guilty.

19. The court further instructs the jury that this is not a civil case, but it is a criminal prosecution; and that the rules as to the amount of evidence in this case, are different from those in a civil case, and a mere preponderance of evidence would not warrant the jury in finding defendant guilty, but before the jury can convict the defendant they must be satisfied of his guilt, beyond a reasonable doubt, and unless so satisfied, the jury should not find the defendant guilty.

692 20. The jury are instructed that the defendant Robert Stroud is presumed to be innocent of the crime with which he is charged, innocent of any guilty intent and innocent of each and every fact necessary for the United States to prove in order to establish his guilt to your satisfaction beyond any reasonable doubt. And this presumption of innocence continues to operate in his favor through all the stages of this trial and you are to look upon him as innocent of crime until his guilt is proved by the evidence and until each and every fact necessary, to constitute the crime is proven by the evidence to your satisfaction beyond any reasonable doubt.

21. The jury is further instructed that this presumption of innocence on the part of the defendant, Robert Stroud, is not a mere form and is not to be disregarded by the jury at pleasure; but this presumption of innocence on the part of the defendant is an essential, substantial part of the law of the land, and binding on the jury in this case. It is your duty and the duty of each member of this jury in this case to give the defendant, Robert Stroud, the full benefit of this presumption and to acquit the defendant unless you are convinced by the evidence in this case that he is guilty of the crime as charged beyond all reasonable doubt.

22. The jury are instructed that the killing of a human being may be either justifiable, excusable or felonious. The killing is justifiable when done in the necessary, or apparently necessary, defense of one's self or fear from great bodily harm, attempted to be committed by force. And in this case if you find that the defendant had any reasonable belief that his assailant was about to do him injury or great harm, then you should not find the defendant
693 guilty.

23. If you believe that guard Turner with a club, stick or other deadly and dangerous weapon, after an angry exchange of words, with the defendant, assaulted or attempted to assault defendant Stroud in a manner and with sufficient force to lead defendant Stroud to believe with reasonable cause that guard Turner was about to inflict great bodily harm upon him or kill him, and that under said belief he drew a knife or dagger and wounded and killed guard Turner to avert such impending harm, then, even though you believe and find from the evidence that defendant was carrying the knife in violation of the prison rules and unlawfully, still such fact should not influence you in considering the evidence tending to establish defendant's natural and legal right of self defense.

(The foregoing requested instructions numbered "1" to "23" inclusive were endorsed by the court as follows:)

Defendant's requests refused.

LEWIS,
Judge.

(And were also marked:)

Filed June 28, 1918. F. L. Campbell, Clerk.

And the court refused each and every of the requests so made by the defendant, and to such ruling and action of the court and to each and every of such rulings, defendant then and there duly excepted and still excepts.

694 And having heard the charge of the Court, as aforesaid, the jury retired to deliberate upon its verdict, in charge of the Marshal of the Court.

695 And at 4 o'clock p. m. of the same day (June 28, 1918) the Marshal having pronounced to the Court that the Jury were ready to report, the Court reconvened, and the Jury returned into Court, under the custody and conduct of the Marshal, whereupon the following proceedings were had:

The Court: Call the jury, Mr. Clerk.

And thereupon the Clerk called the Jury and found all present.

The Court: Have you agreed on your verdict?
The Foreman: We have: your Honor, we have agreed.
The Court: The foreman will pass the verdict to the Marshal.

The verdict of the Jury was then passed by the foreman to the Marshal, who passed the same to the Court.

The Court (handing the verdict to the Clerk): Mr. Clerk, read the verdict.

The clerk thereupon read the verdict which was as follows:

"In the District Court of the United States, for the District of Kansas, First Division. United States of America, plaintiff, against Robert F. Stroud, defendant. Number 4287. We, the jury in the above entitled case, duly empaneled and sworn, upon our oaths find the defendant, Robert F. Stroud, guilty of murder in the first degree as charged in the indictment. Frank M. Johnson, Foreman."

The Court: Is this your verdict, gentlemen?
The Foreman: It is.
Mr. O'Donnell: If the Court please, defendant would like to have the jury polled.
The Court: Call the Jury.
The Clerk: Frank Johnson,
696 Juror Johnson: Here.
The Court: Is this your verdict, Mr. Johnson?
Juror Johnson: Yes sir.
The Clerk: W. B. Dixon.
Juror Dixon: Here.
The Court Is this your verdict, Mr. Dixon?
Juror Dixon: Yes sir.
The Clerk: John Doyle.
Juror Doyle: Here.
The Court: Is this your verdict, Mr. Doyle?
Juror Doyle: It is.
The Clerk: E. L. Carson.
Juror Carson: Here.
The Court: Is this your verdict, Mr. Carson?
Juror Carson: It is.
The Clerk: E. F. Whittaker.
Juror Whittaker: Here.
The Court: Is this your verdict, Mr. Whittaker?
Juror Whittaker: It is.
The Clerk: William E. Osterhold.

Juror Osterhold: Here.
The Court: Is this your verdict, Mr. Osterhold?
Juror Osterhold: It is.
The Clerk: Fred Layton.
Juror Layton: Here.
The Court: Is this your verdict, Mr. Layton?
Juror Layton: It is.
The Clerk: J. W. Birt.
Juror Birt: Here.
The Court: Is this your verdict, Mr. Birt?
697 Juror Birt: It is.
The Clerk: H. D. Kent.
Juror Kent: Here.
The Court: Is this your verdict, Mr. Kent?
Juror Kent: It is.
The Clerk: W. B. Ayars.
Juror Ayars: Here.
The Court: Is this your verdict, Mr. Ayars?
Juror Ayars: It is.
The Clerk: W. H. Wooley.
Juror Wooley: Here.
The Court: Is this your verdict, Mr. Wooley?
Juror Wooley: It is.
The Clerk: H. C. Coons.
Juror Coons: Here.
The Court: Is this your verdict, Mr. Coons?
Juror Coons: It is, sir.

The Court: Is there any reason why the sentence of the law should not now be passed upon the defendant?

Mr. Robertson: If your honor please, I know of none. I move that judgment be pronounced.

The Court: Has the counsel for the defendant any suggestion to make as to the time to be fixed for execution of the sentence?

Mr. O'Donnell: It may be necessary to prosecute a writ of error, and we might need about 90 days?

The Court: For the bill of exceptions—July, August—September Have you a calendar, Mr. Clerk?

(The clerk here produced and handed to the Court a calendar.)

698 The Court: Robert F. Stroud, this is the third jury that has returned a verdict in this Court finding you guilty of murder in the first degree, in taking away the life of Guard Turner in the United States prison in this city. After the return of the first verdict you were sentenced to death. That case was reversed not because the facts did not justify the verdict, but because there was an error in law in the trial of your case. On the second trial, the jury recommended life imprisonment; that sentence was passed against you, and that judgment was likewise reversed, not because the facts did not justify the verdict, but because another error in law had been committed at the trial. Now the third jury, strangers

to you, men whose integrity none of us have any right to question, none of whom knew anything about your case, have heard the facts, and they return a verdict of murder in the first degree against you. With the finding of these twenty-four men—three juries composed of twelve men each, there can be no complaint under the proof in this case of the result at which they have arrived. Three juries have said that there was no reasonable doubt that you committed this wilful, premeditated, deliberate, malicious murder. It is not the desire of these men, or of any Court that has tried your case that you suffer death. They have been strangers to you; they were in no manner responsible for what you did; they were only the instruments of the law for the purpose of executing and ad-
699 ministering justice in accordance with the laws of the United States. It now becomes my duty, as it was the duty of each of the other judges who presided at the other trials, to enter a judgment in accordance with the law upon this verdict; and the judgment and sentence of the Court is that you, Robert F. Stroud, be returned to the United States penitentiary at Leavenworth, Kansas, from which you came, and that you be there held in solitary confinement until Friday, the 8th day of November next; that on that day, between the hours of six o'clock a. m. and nine o'clock a. m., you be taken to a place within the walls of the United States penitentiary at Leavenworth, Kansas, and that you there be hanged by the Marshal of this District until you are dead; and May the Lord God have mercy upon your Soul.

Gentlemen of the Jury, I wish to thank you again for your service as jurors in this case. You will claim your attendance from the Clerk. You are now discharged.

Ninety days for bill of exceptions, Mr. Clerk.

700 And thereupon on said last mentioned day, the following order was duly made and entered herein, to wit:

"Now the defendant, Robert F. Stroud, is granted ninety days from the date of the judgment herein in which to file a bill of exceptions in this case."

And thereafter, to-wit, on the 24th day of September, 1918, by an order duly made herein by the District Judge of said court, and duly entered herein, defendant's said time to file Bill of Exceptions herein was extended to and including the 1st day of November, 1918.

And thereafter, to-wit, on the 16th day of October, 1918, by an order duly made herein by the District Judge of said court, and duly entered herein, defendant's said time to file bill of exceptions herein was extended to and including the 24th day of November, 1918.

And thereafter on the 18th day of November, 1918, by an order duly made herein by the Honorable District Judge of said Court and duly entered herein defendant's said time to file Bill of Exceptions herein was extended to the 24th day of December, 1918.

And thereafter, to-wit, on the — day of ——, 1918, comes defendant and prays the court to settle and allow this Bill of Exceptions to all and singular the acts, orders, and rulings of the court in the premises, and that the same may be signed and filed and made a part of the record herein.

Now, therefore, the court being fully advised in the premises, doth find the foregoing to be a correct bill of exceptions taken and saved on behalf of the defendant herein, and doth now sign the same, and doth order that the same be filed and made a part of the record in this cause.

Given under the hand of the judge of said court before whom said proceedings were had, on this 5th day of December, 1918.

ROBT. E. LEWIS,
Judge of the District Court of the United States,
Assigned for the District of Kansas.

We hereby consent that the foregoing is a full, true and
701 correct Bill of Exceptions on behalf of the defendant herein and agree that the same may be signed, filed and made a part of the record in this cause.

Dated November 29, 1918.

FRED ROBERTSON,
United States District Attorney
for the District of Kansas.
KIMBRELL AND O'DONNELL,
Attorneys for Defendant.

Filed in the District Court December 7, 1918.

702 *Petition for Writ of Error.*

And now comes Robert F. Stroud, defendant herein, and says that on the 28th day of June, 1918, the above court entered judgment herein in favor of plaintiff and against defendant, and further that it pronounced sentence on defendant, in which judgment and the proceedings prior thereunto in this cause certain errors were committed to the prejudice of defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in the case duly authenticated may be sent to the said Supreme Court of the United States.

I. B. KIMBRELL,
MARTIN J. O'DONNELL,
Attorneys for Defendant.

Filed in the District Court Sept. 24, 1918.

703 *Assignment of Errors.*

Now comes into court here said defendant, Robert F. Stroud, in his own proper person, and by his attorneys, and says that in the record and proceedings aforesaid there is manifest error, in this:

1. The court erred in that it denied the petition for a transfer of this cause for trial and prosecution to another d-vision of the District of Kansas, filed by the defendant before the trial of this cause, by which petition it appears that defendant herein was tried twice in the First Division of said District at Leavenworth, Kansas, before the last trial; that said trials were so conducted on the part of the Government that the prosecuting officers of the Government were compelled to confess in open court, after writs of error had been prosecuted from the judgment resulting from said trials to the Supreme Court of the United States and to the United States Circuit Court of Appeals for the Eighth Circuit, that this defendant did not have a trial on either occasion in accordance with the provisions of the constitution and laws of the United States; that defendant was prevented at said trials by the trial court at the instance of the United States Attorney from introducing testimony tending to exonerate defendant from the charge contained in the indictment, that the government at the said trial introduced testimony the tendency of which was to prejudice the minds of the inhabitants of Leavenworth and said First Division against defendant; that same was printed and commented upon in the public press in the city and county of Leavenworth; that same was read by the inhabitants of said county and that it did in fact prejudice the said inhabitants against defendant; that such prejudice existed to such an
704 extent that any jury of the District of Kansas, brought into said county and division to try defendant on the charge contained in the indictment could not be impartial as required by the constitution of these United States; that on the 20th day of May, 1918, at the said Special Term, certain remarks were made by the District Attorney and by the court, which said remarks were published in the press of Leavenworth City and County and conveyed to the inhabitants of said city and county the impression that said defendant had offered to plead guilty to the charge contained in the indictment; and that said remarks on the part of the court were prejudicial to the defendant in that they reflected upon his counsel and conveyed the impression to said inhabitants that his counsel were not reputable members of the profession but were attempting by unprofessional conduct to prevent a trial of defendant on the charge contained in the indictment at the Special Term and that said remarks of said District Attorney and of the Court were calculated to and did create a prejudice against the defendant and his said counsel in said city of Leavenworth and said county of Leavenworth of a contagious variety with which any jury brought into any county to try said cause would inevitably be inoculated and prevent such jury

from being impartial within the meaning of the Sixth Amendment to the Constitution of the United States; that the court denied the defendant's offer in support of said Petition of additional evidence; that the ruling and the decision of the court overruling and denying the defendant's said petition to transfer said cause denied to said defendant the right to be tried by an impartial jury of the state and district where the alleged crime was charged to have been committed and that in violation of the express provisions of the Sixth Amendment to the Constitution of the United States.

2. The court erred in that it overruled and denied the motion of the defendant to quash the jury panels summoned in obedience to the writs issued on the 15th day of April, 1918, and on the 20th day of May, 1918, which motion was filed by the defendant before the trial of this cause from which motion it appears that an affidavit was
705 filed by the United States District Attorney representing the government in this cause which affidavit contained the following language:—

"This affiant further states that he is personally well acquainted with said Kimbrell and O'Donnell, and has at different times discussed said case and various features thereof personally with them. That said Kimbrell & O'Donnell both personally came to the office of this affiant in Kansas City, Kansas, upon Thursday, May 9th, 1918 * * * Said Kimbrell and O'Donnell then and there made known their wish and desire to escape further responsibility for the conduct of the defense of the defendant Stroud, and then and there expressed their hope that something would occur which would make it unnecessary for them to have to longer appear in this cause in his behalf. Said Kimbrell & O'Donnell then and there proposed that the Government consent to have defendant Stroud plead guilty to the charge of second degree murder, with the understanding that as a result thereof the court might sentence the defendant to prison for the remainder of his life. * * *" and from which it appears that the persons named in said jury panels were present in the United States Court room at Leavenworth, Kansas, on the 23rd day of May, 1918, and heard said affidavit and the foregoing statements read in open court and from which it appeared that after said affidavit was read in open court in the presence of the said jury panels the Judge of said court, in the hearing and in the presence of the jury panels from which the jurors who tried this defendant were afterwards selected, stated from the bench that:

"in view of what Mr. Robertson has set forth in his affidavit as to his conference with Kimbrell and O'Donnell, I am compelled to feel that they have acted unprofessionally in not being here this morning, at least one of them."

And it also appears that said affidavit and statement by the court were partially reproduced in the newspapers published in said Leavenworth City and County on and after the 23rd day of May, 1918,

and that the said persons constituting the said panels from which the jury which tried this defendant was drawn were prejudiced against this defendant and that the said persons before said cause was
706 tried, together with the court officials and attaches and the residents and inhabitants of said City and County were led to believe before said cause was tried and before the persons drawn from said panels were sworn as jurors, that the said defendant had admitted to the United States District Attorney that he was guilty of the crime charged and that he was seeking to escape punishment therefor by offering to plead guilty to a lesser grade of the offense included in the indictment and that his attorneys were resorting to tricks of an unprofessional variety in attempt to ward off the punishment which said jurors were led to believe by the said conduct on the part of the said District Attorney and by the said remarks made by the Judge of the said court during the absence of the plaintiff's said attorneys when they were not present and could not defend themselves, was justly due to defendant. It also appears from said motion that defendant prayed the court to grant him leave to introduce evidence in addition to his affidavit in support of the foregoing and other statements contained in his said motion; that the act of the court in overruling said motion and in refusing to permit defendant in addition to his affidavit to introduce evidence in support of the allegations of said motion, denied to defendant the right to be tried by an impartial jury of the state and district wherein the alleged crime was charged to have been committed in violation of the Sixth Amendment to the Constitution of the United States and denied to defendant the right to introduce evidence in support of the allegations of said motion and thereby refused to apply the judicial power of the United States to one of the issues arising in the said cause in violation of Section Two of Article Three of the Constitution of the United States and denied to defendant the right not to be deprived of his life without due process of law in violation of the Fifth Amendment to the Constitution of these United States; that the court in compelling defendant to go to trial before said persons who did not and who could not constitute an impartial jury, assumed to exercise power and did exercise power on the part of the United States which was not delegated to the United States by the Constitution and which was expressly reserved to the States respectively, and this in
707 violation of the Tenth Amendment to the Constitution of these United States.

3. The court erred in that it overruled and denied the defendant's motion filed before the trial of this cause praying the court to render judgment in this cause in accordance with the judgment and mandate of the Supreme Court of the United States from which motion it appears that a writ of error was prosecuted in this cause to the Supreme Court of the United States from the District Court of the United States for the District of Kansas and that the issues raised upon said Writ of Error as shown by the Assignment of Errors, among others, were as follows:

"The court erred in that it denied the defendant's petition for a rule upon the United States District Attorney, Marshal and Clerk to return to defendant letters unlawfully and unreasonably seized and searched after same had been deposited with officers of the government of the United States for transmission through the mails, thus and thereby depriving defendant of his rights to be secure from unreasonable searches and seizures under the provisions of the Fourth Amendment to the Constitution of the United States.

The Court erred in that it admitted the letters mentioned in the Third Assignment of Error herein after it had taken jurisdiction of the issue made upon defendant's petition for a rule upon the District Attorney to return same to defendant, and heard evidence showing that said letters had been unlawfully seized and searched, before the trial of this cause, and this in violation of defendant's rights under the Fifth Amendment."

And from which motion it appears that the United States appeared in said Supreme Court of the United States by the Honorable John W. Davis, Solicitor General, and confessed the said errors alleged against the said judgment and said judgment was thereupon reversed and the cause remanded to said District Court for further proceedings and became res adjudicata and the law of the case and that the act of the District Court in refusing to enter judgment in accordance with the said decision of the Supreme Court of the United States from the said issues denied to defendant the equal protection of the laws and was an attempt on the part of the court to deprive defendant of his life without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

4. The court erred in that in violation of Section 275 of the
708 Judicial Code of the United States prescribing that Jurors shall have the same qualifications in the courts of the United States in each state respectively as jurors of the highest court of law in such state may have or be entitled to at the time when such jurors for service in the courts of the United States are summoned, it is imposed upon the jurors a rule of qualification not recognized by the laws of the state in which the court was sitting, towit, the State of Kansas, and over the objection of the defendant, sustained the challenges of the government to Chester Moore, John A. Basgall, J. F. Moherman, William D. Schmidt, Will Myers, E. L. Carson, C. D. Eldridge, Charles Bradshaw, C. C. McCammon, Edward F. Heim, Fred Legler, J. S. Meserve, Elmer E. Manley, John Putnam, C. W. Layman, veniremen who were duly summoned to serve as jurors in said cause upon the alleged ground that said jurors had conscientious scruples against the imposition of capital punishment, in first degree murder cases notwithstanding the law of Kansas as shown by Section 3367, General Statutes of Kansas, 1915, defines first degree murder in terms similar to those in which the crime charged against the defendant is defined by Section 273, of the Penal Code of the United States, 1910, and notwithstanding the law of Kansas by Section 3369 of said General Statutes provides that the punishment for such

crimes shall be imprisonment in the penitentiary for life, and notwithstanding the law of said state provides that a jury who has conscientious scruples against the imposition of capital punishment shall be a qualified juror to try a defendant on a charge of first degree murder, and notwithstanding said veniremen possessed the qualifications required by Section 275, of the Judicial Code of the United States to try the defendant on the charge contained in the indictment. That the act of the court in refusing to permit said veniremen to sit as jurors in said cause and sustaining the challenge of the Government to said jurors over the defendant'- objection and exception was a denial to defendant of the right to be tried by an impartial jury of the state and district where the alleged crime was charged to have been committed in violation of the Sixth Amendment to the Constitution of the United States and denying to defendant the equal protection of the law and adjudging that he — deprived of his
709 life without according to him that due process of law guaranteed to all persons by the Fifth Amendment to the Constitution of the United States.

5. The court erred in overruling the defendant's challenge to veniremen, Elmer Williamson, Irving Hill, from whose examination on their voir dire it appeared that said veniremen, acting as jurors would never in any case of first degree murder vote for or be in favor of imprisonment for life but would in all such cases concur in a verdict authorizing the infliction of the death penalty and were therefore shown to be jurors who were not qualified to sit on the trial of a charge of murder in the first degree in the state of Kansas as jurors and who were opposed to the penalty affixed by Section 3369 of the General Statutes of the State of Kansas, 1915, and were so constituted that they could not qualify as jurors in the state in which they resided in the first degree murder case and were not qualified to render a qualified verdict as required by Sec. 303 of the Penal Code of the United States of 1910, were therefore not qualified to serve as jurors in the District Court of the United States in the State of Kansas. The rulings of the court denying defendant's challenge to said veniremen denied to plaintiff the right to be tried by an impartial jury of the state and district wherein defendant was charged with having committed the crime of murder in the first degree and violated his right, under the Sixth Amendment to the Constitution of the United States.

6. The court erred in that notwithstanding the witnesses Whitlach, Beck, Pollard and Boyer, sworn on behalf of the government, gave evidence tending to support the special defense of self-defense relied upon by the defendant and notwithstanding the court stenographer, Miss Elizabeth La Bar, gave evidence tending to show that the witnesses Whitlatch and Beck, under oath, at previous trials, gave evidence in addition to that given by said witnesses on the trial herein tending to support said special defense, yet, the court, in charging the jury, limited the jury to the evidence of defendant's witnesses to support that issue, thus:

710 "And on this defense I call your attention to the fact that it appears in evidence in this case on the part of some of the defendant's witnesses that the deceased, Turner, drew his club on the defendant, that the defendant grabbed it once or twice and struggled over it, and that thereupon the deceased did raise it as if to strike the defendant, and while the club was thus in the air deceased was struck the fatal blow. If that testimony is accepted by you as being the true facts on that occasion, and you believe from those facts that the defendant believed and had reasonable cause to believe that he was being threatened with immediate personal injury, then he had a right to strike Turner in defense of his own person, and the law in that respect is the same within the prison walls as it is upon the streets of Leavenworth. But the question for your determination on that plea and that principle of law is, whether or not you will accept the testimony of the defendant's witnesses as disclosing the true facts at that time."

To which charge of the court the defendant, by his counsel excepted as follows:

"—the defendant excepts to the charge of the court, in that it has partially stated the evidence tending to substantiate the issue of self-defense, and has omitted testimony of Miss La Bar showing that Mr. Whitlatch and Mr. Beck testified at the first trial that the defendant had a struggle with a club, and also the testimony of Mr. Pollard showing that it was an angry altercation between the deceased and the defendant."

That the court in thus charging the jury, in effect, prevented them from considering the testimony of the witnesses sworn on behalf of the government tending to support said special defense and required them to exclude same from their consideration when considering whether or not the homicide was justifiable on the grounds of self-defense, thus and thereby denying to the defendant the right to have the facts in the case tried by a jury and the right to have the question of his guilt or innocence determined upon all the facts in the case as shown by all the evidence thereby denying to defendant the equal protection of the law and denying to him the right to be tried in accordance with the ordinary processes of the law in violation of his rights under Section 2, Article 3, of the Constitution, and the Fifth and Sixth Amendments to the Constitution of the United States.

7. The court erred in that it undertook to try defendant, notwithstanding it appeared from the indictment herein that the alleged crime was committed in the county of Leavenworth, State of Kansas, and not at a place over which the United States had exclusive jurisdiction as provided by Clause 17 of Section 8 Article 1, of the
711 Constitution of the United States and notwithstanding it does not appear that the death of the deceased occurred in any place over which the United States has exclusive jurisdiction as provided by said clause of said Constitution and notwithstanding said indictment fails to show that the grand jury found upon their oaths and stated as

a fact in said indictment that the said defendant did kill and murder the deceased in the manner and form charged but that the said indictment merely constitutes the conclusions of the Grand Jury in the form of a charge without any finding of fact upon which to base same and that the indictment fails to charge the defendant with murder of the degree and committed by the manner and means and at the time and place of which he stands convicted by the verdict of the jury and said indictment fails to charge the defendant with having committed and fails to state that the defendant committed the crime denounced by Section 273, of the Penal Code of the United States or with having committed a crime prohibited by any law of the United States, and this in violation of defendant's rights under the Sixth Amendment of the Constitution of the United States.

8. The court erred in admitting the testimony of the witness Alexander and of the witness Morgan, the prison warden and guard in whose custody the said defendant was at the time of the alleged conversation detailed by the said witnesses in evidence and under whose power he was at said time and subject to punishment at their hands and at the time when he was in solitary confinement charged with the crime of which he was convicted and this notwithstanding said testimony had no tendency to prove or disprove any issue or fact charged in the indictment or involved in the case, and this in violation of defendant's rights not to be compelled to give testimony against himself under the Fifth Amendment to the Constitution of the United States.

9. The court erred in directing the jury and in permitting the jury to carry the indictment to the jury rooms which indictment contained the following indorsement "Vio. Sec. 273 and 275, Penal Code of 1910. Penalty, Death; A true bill", for the reason
712 that said Section 273 which said indorsement charged to have been violated, defined murder in the first degree only and Section 275 provides that the penalty for said crime shall be death only, and the jury were thereby instructed that the only penalty which the law attached to the crime charged was death and the indorsement of the words "Penalty, Death", neutralized the oral charge of the court and wiped same from the minds and memory of the jury and led the jury to believe that the only verdict which they could properly find against the defendant was a verdict which would necessarily result in a sentence carrying with it the penalty of death and the jury was thereby misled as to the law and prevented from exercising their discretion to qualify their verdict by inserting the words "without capital punishment", in same.

10. The Court erred in that it denied the defendant's petition for a rule upon the United States District Attorney, Marshal and Clerk to return to defendant letters unlawfully and unreasonably seized and searched after same had been deposited with officers of the government of the United States for transmission through the mails, thus and thereby depriving defendant of his rights to be secure from unreasonable searches and seizures under the provisions of the Fourth Amendment to the Constitution of the United States.

11. The court erred in that it admitted the letters mentioned in the Tenth Assignment of Error herein after it had taken jurisdiction of the issue made upon defendant's petition for a rule upon the District Attorney to return same to defendant, and heard evidence showing that said letters had been unlawfully seized and searched, before the trial of this cause, and this in violation of defendant's rights under the Fifth Amendment to the Constitution of the United States.

12, The court erred in sustaining the objection of the United States to defendant's offer to introduce in evidence at the close of all the testimony the mandate of the United States Circuit Court of Appeals for the Eighth Circuit reversing and remanding this cause on the first trial thereof, together with the assignment of
713 errors filed in said Circuit Court of Appeals and in said District Court, which errors were confessed by the Government in said Circuit Court of Appeals and upon which confessed errors the said Circuit Court of Appeals based its decision in reversing said cause and which decision constituted the law of the case and was res adjudicata and binding upon the said District Court. And that the act of the court in excluding the said mandate and assignment of errors and in refusing to consider same and in refusing to discharge defendant on the ground that the matters and things and issues involved in said cause had already been adjudicated, was a denial to the defendant of that due process of law secured to him ny the Sixth Amendment to the Constitution of the United States.

13. The court erred in that notwithstanding the evidence disclosed that the defendant was insane and notwithstanding there was evidence in the cause tending to show that said defendant was insane at the time of the alleged homicide and notwithstanding the government conceded that there was such evidence in the case by offering evidence to rebut same, yet, the court stated in the hearing of the jury at the close of all the testimony adduced by the defendant that said defendant has not introduced any evidence tending to show a justifiable homicide, thus and thereby denying to defendant the right to have the issues in said cause tried by jury and this in violation of the defendant's right under the Sixth Amendment to the Constitution of the United States.

14. The court erred in that it omitted to instruct the jury that if they found and believed from the evidence that the defendant was insane at the time of the commission of the homicide they *they* must find the defendant not guilty.

Wherefore, the said Robert F. Stroud prays that the judgment aforesaid may be reversed, annulled and altogether held for nothing, and that he may be restored to all things he has lost by said judgment and sentence.

ISAAC B. KIMBRELL,
MARTIN J. O'DONNELL,
Attorneys for Plaintiff in Error.

714 Filed in the District Court September 24, 1918.

Order Allowing Writ of Error.

This 24th day of Sept., 1918, came the defendant and filed herein and presented to the court his petition praying for the allowance of a writ of error, and assignment of errors intended to be urged by him, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, be sent to the United States Supreme Court at the City of Washington.

In consideration whereof, the Court does allow the writ of error.

JOHN C, POLLOCK,
United States District Judge.

Filed in the District Court September 24, 1918.

715 *Præcipe for Transcript.*

To the clerk of the above named court:

The above named Plaintiff in Error desires to have included in the transcript of the record forwarded to the Supreme Court, the following parts of the record in the above court:

1. The Indictment.

2. Plea of Defendant.

3. Assignment of Errors filed herein after the conviction of defendant at the special May, 1916, Term of this court.

4. Mandate of the United States Circuit Court of Appeals for the Eighth Circuit filed herein reversing the judgment rendered in this cause at the special May, 1916, Term of this court.

5. Verdict returned in this cause on Monday, May 28th, 1917.

6. Judgment and sentence pronounced on said verdict and entered of record in this cause on Monday, May 28, 1917.

7. Assignment of Errors filed herein on or about the 25th day of August, 1917, after the rendition of said last described judgment and sentence.

8. Mandate of the Supreme Court of the United States reversing the judgment rendered herein on the 28th day of May, 1917.

9. Empaneling of jury.

10. Verdict.

11. Judgment.

12. Bill of Exceptions.

13. Petition for Writ of Error.
14. Assignment of Errors.
15. Citation to defendant in Error.
16. Order allowing Writ of Error.
17. Writ of Error.
18. Clerk's Certificate.

I. B. KIMBRELL,
MARTIN J. O'DONNELL,
716 *Attorneys for Plaintiff in Error.*

Stipulation.

It is hereby stipulated and agreed that the portions of the record above described shall be transcribed by the Clerk into the transcript of the Record and forwarded to the Clerk of the Supreme Court of the United States and shall constitute the transcript of the record in said cause in said court.

——— ———,
United States District Attorney for the District of Kansas.
I. B. KIMBRELL,
MARTIN J. O'DONNELL,
Attorneys for Plaintiff in Error.

STATE OF MISSOURI,
County of Jackson, ss:

Luther W. Adamson, of lawful age, being duly sworn upon his oath states:

That on the 14th day of December, 1918, at the County of Wyandotte, State of Kansas, and within the District in which said cause was tried, he served a copy of the Præcipe hereto attached, upon Fred Robertson, Esq., United States District Attorney for the District of Kansas, by delivering same to said District Attorney with the request that he sign the stipulation attached to and made a part of the foregoing Præcipe.

LUTHER W. ADAMSON.

Subscribed and sworn to before me this 14th day of December, 1918.

[SEAL.] PEARL M. CRAIG,
Notary Public.

My commission expires August 27, 1919.

Filed in the District Court December 17, 1918.

717 UNITED STATES OF AMERICA,
District of Kansas, ss:

I, F. L. Campbell, Clerk of the District Court of the United States of America for the District of Kansas, do hereby certify the foregoing to be true, full and correct copies of so much of the record and proceedings in case No. 4287, entitled: The United States of America, Plaintiff, vs. Robert F. Stroud, Defendant, in said court, as is called for in defendant's præcipe on file herein.

I further certify the original Citation and Writ of Error are attached hereto and returned herewith.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Topeka, in said District of Kansas, this 30th day of December, 1918.

[Seal of District Court U. S., District of Kansas, 1861.]

F. L. CAMPBELL,
Clerk.

Endorsed on cover: File No. 26,897. Kansas D. C. U. S. Term No. 276. Robert F. Stroud, Plaintiff in error, vs. The United States of America. Filed January 17th, 1919. File No. 28,897.

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

ROBERT F. STROUD, PLAINTIFF IN ERROR,
v.
THE UNITED STATES OF AMERICA. } No. 811.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General and respectfully moves the Court to advance the above-entitled case on the docket for hearing at the opening of the next term.

Stroud was convicted of murder in the first degree and sentenced to be hanged. The murder was committed while he was a prisoner in the Leavenworth Penitentiary by stabbing to death one of the guards of the institution.

A writ of error has been sued out by Stroud from this Court upon the ground that the trial accorded him was not one by an impartial jury and violated his rights under the Sixth Amendment to the Constitution. He also asserts that error was committed

119881—19—1

by the trial court, in violation of his constitutional rights, in rulings, among others, upon the admission and rejection of evidence and in charging the jury.

Notice of this motion has been served upon opposing counsel.

ALEX. C. KING,
Solicitor General.

MAY, 1919.

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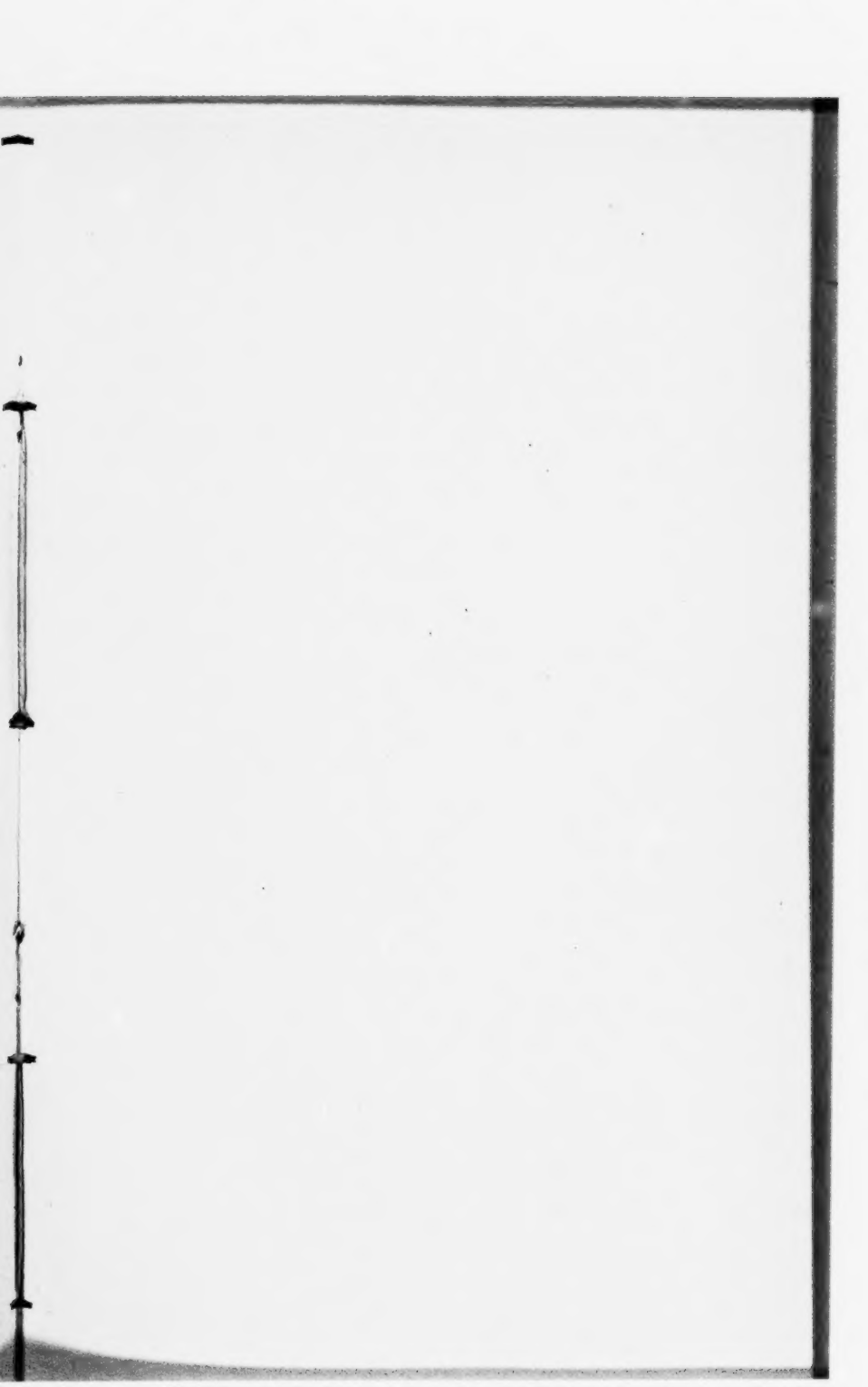

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In the

Supreme Court of the United States

October Term, 1919.

ROBERT F. STROUD, *Plaintiff in Error,*

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

In Error to the District Court of the United States for the District of Kansas.

No. 276.

STATEMENT.

(NOTE.—With the permission of the Court we will refer to plaintiff in error as "defendant.")

This case is based upon an alleged violation by defendant of Sections 273 and 275 of the penal code. An indictment charging defendant with the murder of one Andrew F. Turner at the United States Penitentiary, in the county of Leavenworth,

Kansas, on the 26th day of March, 1916, was filed in the United States District Court at Leavenworth, on the 13th day of April, 1916. A trial at a special term of said court, on May 27th, 1916, resulted in a verdict of guilty on which a death sentence was pronounced. On writ of error the Court of Appeals for the Eighth Circuit reversed the judgment and sentence after having heard the statement of the district attorney. The cause was remanded to the District Court with directions to grant a new trial (21). At a special term of the District Court of Kansas, held on the 28th day of May, 1917, the defendant was again tried on said indictment and found "guilty as charged in the indictment without capital punishment" (22). Defendant was thereupon sentenced to imprisonment for life (23). On writ of error to this Court the latter judgment was on February 14, 1918, reversed, and the cause ordered to be remanded to the "District Court for further proceedings" (25). The mandate transmitted by the clerk of this Court in obedience to said order contained the following paragraph:

> "You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the judgment of this Court, as according to right and justice, and the laws of the United States ought to be had."

The reversal of this cause by this Court was based upon a confession of error and a motion to reverse the judgment filed by Mr. Solicitor Gen-

eral Davis (25). The judgment of this Court reversing the cause recited that

> "It is therefore in pursuance of said confession and motion, now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed" (25).

Incorporated in the confession of error was a prayer that the cause be remanded to the District Court "for new trial" (34). This prayer was ignored by this Court and the cause remanded for further proceedings in accordance with the laws of the United States. Thereafter defendant prayed the District Court to render judgment in accordance with the mandate of this Court and this prayer was denied (26).

On April 3, 1919, on the motion of the United States, during the absence of defendant's counsel, the mandate was spread on the journals of the District Court and the following order made:

> "It is further ordered that the former judgment of this Court sentencing the defendant to be imprisoned in the United States Penitentiary at Leavenworth, Kansas, for the period of his natural life, is hereby vacated, set aside and held for naught, and a new trial of this cause is ordered to be had."

The cause came on for trial at an adjourned term of the District Court on June 24, 1918. Said trial resulted in a verdict on June 28, 1918, in the following words and figures (omitting caption):

> "We, the jury in the above entitled case, duly empaneled and sworn upon our oaths, find the defendant, Robert F. Stroud, guilty of murder in the first degree, as charged in the indictment."

On this verdict the court sentenced defendant to solitary confinement for the balance of his life, and ordered that on the last day thereof, to-wit, on the 8th day of November, 1918, he be hanged by the neck until dead (29).

On the 26th day of March, 1916, the defendant was an inmate of the Federal Penitentiary at Leavenworth, Kansas.

On that date the defendant and about 1,200 convicts were at their noon meal in the mess hall. The deceased Guard Turner walked or paced during meal time in an aisle not far from which the defendant was seated. Turner had come to Leavenworth from the Atlanta Penitentiary, carrying with him a reputation for brutality to prisoners. According to that reputation he had killed a boy with his club shortly before leaving Atlanta. He had stricken down a prisoner in the dining room shortly before the tragedy without any apparent reason and injured him so that he had to be carried out of the room (416-17-18). Turner was a brawny, well-developed man, and was known amongst the prisoners as an extremely irascible, excitable, severe and cruel guard (418). There was not a man in the prison would speak a good word for him (420). His reputation amongst the prisoners was that "He was a hard guard—a hard boiled" (429).

Stroud's brother, a young boy, had brought some cakes and fruit to the prison from Alaska on the previous evening, but was not permitted to see the defendant because defendant had spoken to a companion seated at his table in violation of the rules. Defendant had not seen his brother for three years, and lest he should be unable to see him before he left for Alaska, sought to discuss the matter with the guard. (See statement at page 224). For this purpose Stroud raised his hand, thus seeking permission from Turner to step into the aisle. This was granted and Stroud and Turner engaged in conversation. Witnesses on behalf of the Government (as well as those for the defense) demonstrated that Turner attacked Stroud while the conversation was in progress, and after Stroud had civilly questioned him (253, 308-309-310). The witness Pollard, on behalf of the Government, testified that he "noticed more particularly that Stroud was boisterous, angry, provoked about something" (308). "Stroud was the angry one" (390).

"Both were mad" (311, 314). It was the angry voices that attracted his attention (315). Whitlach, a guard, at a former trial testified that when he first saw Stroud and Turner they were standing in the aisle talking and that he saw Stroud grab for Turner's club (403-404). He denied having thus testified at last trial (403).

A guard named Beck testified at a former trial that he saw the struggle for the club before the blow was struck (407). This he denied at the last trial. A guard named Boyer saw Stroud strike Turner, but though he was looking directly

at them, he saw no struggle for the club *after the blow was struck by Stroud.*

Turner reached for his club after he and Stroud had talked for a few seconds. Stroud made a grab for the club and seized it with both hands, but Turner jerked the club away and raised it high in the air when Stroud in self-defense struck him with a knife in the breast and inflicted a wound, as a result of which he died.

Stroud had had the knife in his possession for nine months before the killing. He had carried it in a leather sheath in his coat before the deceased had been removed from Atlanta to Leavenworth and had used it to shave and pare his nails (320-321).

The convicts who testified on the part of the Government had been bribed by pardons. John Burton is a good specimen of the kind of witness on whose testimony the verdict rests. A singular feature of the Government's case was that all of its witnesses who claimed to have been present at the killing were selected from amongst the convicts who sat in front of the struggling men so that their faces were directed away from the scene at the inception of the tragedy. There were hundreds of men who were looking directly toward the participants at the inception of the struggle, but these were not used by the Government. Defendant succeeded at the trial now under discussion in putting nine convicts on the stand who were seated in various parts of the hall, and whose testimony demonstrated that the deceased had in pure wantonness attacked a poor convict who dared to speak to him. The testimony of the witness Dar-

nell (440) is typical of that of the others, the substance of which in connection with that of the Government's witnesses Whitlach, Beck and Pollard, disclosed that Stroud struck in self-defense.

At the previous trial the defendant had been unable to procure the testimony of the convicts for the reason that the district attorney objected on the ground that a convicted felon was an incompetent witness, and this notwithstanding he procured pardons for those whom he chose to use as witnesses on the part of the Government.

To destroy the effect of the testimony of the convicts at the last trial the district attorney so conducted himself as to inflame the district judge called in from another district and the panels from which jurors were chosen with passion and prejudice against the defendant and his counsel so that defendant did not have a fair and impartial trial, such as the Constitution contemplates.

The cause was set for trial at a special term on May 20th, 1918. Defendant's counsel were compelled to go into a trial on the 13th day of May, 1918, in the Circuit Court, of Jackson County, Missouri. For reasons which were beyond their control this trial was not finished until May 28th, 1918. The district attorney had ample notice of this situation and instead of making some arrangement to save the Government unnecessary expense and notifying Judge Lewis, filed his affidavit reciting that defendant's attorneys in a confidential conversation with him had offered to have defendant *enter a plea of guilty*, and that believing the defense hopeless, they had withdrawn from the case. This affidavit was read in the presence of

the prospective jurors, and it, in connection with the representations made by the district attorney concerning defendant's counsel, caused the district judge to announce from the bench that defendant's counsel had acted unprofessionally, and that if they were within the jurisdiction of the court he would order the marshal to take them into custody.

The court appointed counsel to represent defendant, but upon their representation that it was impossible to prepare themselves for trial in the time allotted, and upon defendant's objection, the cause was continued to June 24th, 1918, for trial.

The statements aforesaid on the part of the court and district attorney were heralded throughout the first division of the district of Kansas and commented upon in the newspapers, with the result that even the newspaper reporters recognized that such a prejudice had been created against defendant's counsel that they could render no service to Stroud before any of the members of the panel. One newspaper closed its comments on this question thus:

> "Stroud is shrewd enough to recognize by this time that these Kansas City lawyers are not the ones he now wants to look after his interests" (54).

On June 24, 1918, in accordance with the provisions of section 53, of the Judicial Code, the defendant with the permission of the court filed a motion, verified by affidavit, setting forth that the inhabitants of Leavenworth county, and the first

division of the district of Kansas, were prejudiced against defendant and his counsel, because of the manner in which two prior trials had been conducted by the district attorney at Leavenworth, and particularly by the conduct of the district attorney and the denunciation of defendant's counsel by the court during their absence, attending another court. Said motion also recited that such prejudice had been created in the minds of the inhabitants of the first division of the district, that defendant could not enjoy the right to an impartial trial of the variety contemplated by the Sixth Amendment to the Constitution and prayed that the court for said reason change the venue or transfer the cause for trial to another division of the District of Kansas. The defendant prayed the court to grant him leave to introduce evidence in addition to his affidavit in support of the allegations of the motion. The court having considered the motion refused to hear any evidence but found as a fact that prejudice against the defendant and his counsel existed in said division of the district by sustaining the motion in so far as asked for the exclusion of the inhabitants of Leavenworth as jurors, saying "to that extent it will be sustained" (38). The motion was thereupon overruled by the court, the defendant excepting.

Thereupon the defendant filed a motion (38) to quash the jury panels for the reason that all of the persons on same were present in the court room on May 23, 1918, and heard the reading of the aforementioned affidavit of the district attorney, the remarks of the court, and having read the

comments thereon in the public press, had become prejudiced against defendant and his counsel named in the affidavit, so as to render them incapable of acting as a fair and impartial jury in accordance with the requirements of the Sixth Amendment and that to put defendant on trial for his life before such persons would be to deny him that due process of law secured to him by the Fifth Amendment. The motion also disclosed that defendant never authorized his attorneys, or any other person to make any proposition to the district attorney to plead guilty, and that the statements in the affidavit of the district attorney were unwarranted.

The defendant also offered to introduce evidence in support of said motion, which evidence the court refused to hear. Attached to the motion was a list of the proposed jurors who were present during the proceedings in the court room on May 23, 1918; a partial stenographic report of said proceedings, and an article from the Leavenworth Times descriptive of same, with comments thereon. The court overruled the motion to quash the panels excepting as to jurors from Leavenworth county (26), and thereby found as a fact that the proposed jurors were present and heard what transpired on May 23 in the court room.

The testimony of juror Finnegan (160-163) on the *voir dire* examination supported the allegations of the motions, thus:

> "Q. Have you heard the purported facts in this case? A. No more than I heard in the court room (160).
>
> * * * * * * *

Q. You said Mr. Finnegan, you didn't know anything about this case, except what you heard in this court room—when did you first hear it in this court room? A. I was here a month ago.

Q. At that time you heard some statements made by Mr. Robertson about the case? A. Yes, sir.

* * * * * * * *

Q. Didn't you hear Mr. Robertson's statement about the case? A. Yes, sir.

Q. And you heard his Honor make some remarks in the case? A. Yes, sir.

Q. He made some remarks about the counsel in the case? A. He didn't have much counsel at that time.

Q. You heard the remarks, whatever they were? A. Yes, sir.

Q. And what you heard at that time and today is all you have heard about the case? A. Yes, sir.

Q. Now, Mr. Finnegan, what you heard necessarily created some opinion in your mind about the guilt or innocence of the defendant? A. Well, the slightest bit, yes, sir.

Q. That is to say, after having heard what transpired about this case, you had an opinion that would require evidence to remove? A. Yes" (161).

The juror was challenged by the defendant for cause and the court thereupon interrogated the juror. The concluding question and answer with what then transpired follows:

"Q. And you have an opinion now, as to his guilt or innocence? A. I guess I have an opinion.

The Court: Do you challenge him?

Mr. O'Donnell: Yes, we challenge him, your honor, for cause.

The Court: * * * I am satisfied he—as qualified as any juror you will get. * * * If it takes all summer we are going to try this case" (163).

The court by this language accentuated the injury done to the defendant on May 23rd, by leading the jury to believe that defendant's counsel were making frivolous challenges so as to further delay the trial throughout the summer.

Another juror on the examination thus responded:

"Q. Have you heard anything about this case? A. I read a short account of it in the papers and *heard what was talked here a month ago.*

Q. Have you a feeling of prejudice against capital punishment? A. No, sir, but rather *from what I have read and heard about it. I am rather in favor of capital punishment in this case* (164).

* * * * * * *

Q. Mr. Randall, you have never heard about this case until the 23rd of last May, as I understand? A. Yes, sir.

Q. You were then in this court room? A. Yes, sir.

Q. At that time you heard Mr. Robertson talking something about this case? A. Yes, sir.

Q. And you also heard his Honor on the bench, Judge Lewis, talk about the case? A. Yes, sir.

> Q. And that was all you heard about the case until today? A. Yes, sir, except what I read in the papers in the meantime, a short article" (166).

Notwithstanding the truth of the allegations of the motions to transfer and quash the panels were thus substantiated and no denial was made by the Government, the court refused any relief to defendant, but manifested its intention to try the defendant before a confessedly incompetent jury "if it took all summer." To the ruling of the court denying the motion and in refusing to hear testimony in support thereof, the defendant excepted.

Thereupon defendant presented a verified petition to the court (57), from which it appeared that United States officials in violation of defendant's rights, under the Fourth and Fifth Amendments of the Constitution, had unlawfully and without any warrant seized letters deposited by defendant with the Government for transmission through the mails: that said letters were in the possession of the district attorney, and that the district attorney and other officers had refused to return those letters to defendant; that the district attorney intended using them at the trial, and that unless the court ordered their return defendant's rights under said amendments would be further violated. The petition was a duplicate of that presented prior to the preceding trial and by agreement between the parties and the court the transcript of the former proceedings was submitted in connection with the petition. From this transcript it appeared that the district attorney justified the un-

lawful seizure of the letters on the ground that defendant was a convicted felon, and that he had no civil rights and *was not a person* within the meaning of the Fourth and Fifth Amendments to the Constitution, and that the letters contained material testimony tending to show the defendant guilty (61). The defendant called the warden and his deputies to establish the facts set forth in the petition and it appeared from the testimony of the warden that Stroud had written the letters and delivered them to an officer of the Government for transmission through the mails upon the representation made to him that they would be transmitted through the mails and that he deceived the defendant, by leading him to believe that they were being transmitted and that he, the warden, personally seized and confiscated the letters for the very purpose of using them as evidence against defendant (75-76). The petition was denied by the court, and to this ruling the defendant excepted (77).

At the trial the district attorney offered the letters above mentioned in evidence and they were admitted over the objection of the defendant on the ground that to admit the letters would amount to a violation of defendant's rights under the Fourth and Fifth Amendments. To the ruling defendant excepted.

The letters as a whole demonstrated that defendant is insane.

The case was called for trial and thereupon 70 veniremen were examined on the *voir dire* examination. This examination is shown on pages 79 to 214 inclusive of the record. The court sus-

tained the Government's challenges to 15 veniremen on the ground that said veniremen were opposed to capital punishment and this, either as a policy or conscientiously, notwithstanding said veniremen were qualified to sit on the trial of an indictment charging first degree murder under the Kansas statute, which is identical with section 273, of the Penal Code. Some were excused who were opposed to the death penalty as a policy, but who testified that they believed in its imposition in some cases, and would be governed by the instructions and the evidence. To the court's action in sustaining those challenges, the defendant objected and excepted on the ground that under the provisions of section 275, of the judicial code, they were qualified. The court overruled defendant's challenge to two jurymen whose *voir dire* examination disclosed that if they found the defendant guilty of first degree murder, they would vote to hang him and never under any circumstances agree to qualify their verdict by adding the words "without capital punishment" as provided by section 330, of the penal code.

The evidence tended to show that defendant was in the hospital on many occasions for "observation" to ascertain whether he was sane (442), and the letters introduced in evidence and other matters disclosed that defendant was suffering from insanity at the time of the homicide.

In the charge to the jury the court altogether omitted to submit the issue of insanity to the jury, and limited the jury in considering the issue of self-defense to the testimony of *defendant's* witnesses alone, and excluded the facts and circum-

stances and all testimony given on that issue by the witnesses for the Government, thus denying to the defendant the right to have the jury pass upon the facts in evidence in violation of his rights under the Fifth and Sixth Amendments.

The district attorney, over objection, told the jury that defendant had a right to testify in his own behalf but was not bound to, and the court, in charging the jury, stated that defendant had a right to testify in own behalf, thereby violating defendant's rights under the Fifth Amendment, and caused the jury to draw unfavorable inferences against him (477). The court also allowed the jury to have the indictment while deliberating (478), notwithstanding the indorsement on said indictment recited that the penalty was death.

Though this court refused to award a new trial and notwithstanding it appeared from the record that the defendant did not ask for a new trial, either in this or the trial court, after his conviction in May, 1917, the trial court, without setting aside the former verdict and in violation of defendant's rights under the jeopardy provision of the Fifth Amendment subjected the defendant to jeopardy of his life a third time and tried and sentenced defendant as heretofore stated.

Because of the violation of his constitutional rights in the manner aforesaid and because his conviction of a capital offense and sentence to capital punishment, defendant invokes the jurisdiction of this Court.

Defendant contends herein that the judgment should be reversed and his discharge ordered for the following reasons:

(A) The District Court was without jurisdiction to try the defendant on June 24, 1918, for the reason that it appeared from the record of the District Court that defendant had theretofore been placed in jeopardy of his life for the same offense on a valid indictment before a court properly organized and having jurisdiction of the defendant and the subject matter of the indictment.

(B) The courts of the United States have no power to award a new trial after conviction in a capital case.

(C) This court did not on the former writ of error either write an opinion indicating that it was its intention that defendant should again be tried nor in the judgment of reversal award a venire *de novo*, but ignored the prayer of the solicitor general that the cause be remanded *for a new trial* and therefore the only power remaining in the District Court, after remand of the cause, was to order the discharge of the defendant.

(D) This Court did not on the former writ of error make any ruling as to the validity of the verdict, did not direct the lower court to grant a new trial, and the District Court failed to set aside the former verdict, and notwithstanding the same remains in full force and effect on the record of the District Court it undertook to try the defendant again. Its proceedings are therefore *coram non judice*.

(E) The court erred in refusing to quash the entire jury panels after it had found that prejudice permeated part of the panels to such an extent as to disqualify them for service as jurors, and this notwithstanding the entire panels had

been subject to the identical influences which had poisoned the minds of those excused.

(F) The court erred in refusing to transfer the cause for trial to another division of the district because of the prejudice against defendant which it found to exist in the first division.

(G) The court erred in holding that defendant was not a person within the meaning of the Fourth and Fifth Amendments, and that he had no rights either as a human being or under the Constitution which the officers of the penitentiary or the district attorney were bound to respect, and that they were justified in seizing his letters deposited with the officers of the Government for transmission through the mails.

(H) The court erred in failing to give effect to the judgment of this Court rendered in this cause on February 4, 1918, the legal effect of which judgment of reversal, based upon a confession of error failing to specify the errors confessed, amounted to a decision that all the assignments of error were well taken and the reception in evidence of the defendant's letters failed to give effect to the law of the case as declared by this Court in said decision.

(I) The court erred in sustaining the Government's challenge to the 15 veniremen whose *voir dire* examination disclosed that they were opposed to capital punishment for the reason that a verdict with or without capital punishment would satisfy the requirements of the laws of the United States and for the reason that the said veniremen were competent to sit on the trial of a first de-

gree murder charge under the laws of Kansas, even though opposed to capital punishment, and were therefore qualified to sit as jurors on the trial hereof by virtue of Section 275 of the judicial code.

(J) The court erred in refusing to sustain the defendant's challenge to two veniremen whose examinations disclosed that they were not qualified in a first degree murder case to impose the penalty provided by the statutes of Kansas for such crime, and were not qualified to modify their verdict in conformity with Section 330 of the penal code of the United States, and therefore did not possess the qualifications required by Section 275 of the judicial code.

(K) The court erred in limiting the jury on the issue of self-defense to the consideration of the oral testimony of defendant's witnesses and excluding from their consideration the testimony of the witnesses for the Government and all the facts and circumstances disclosed by all the testimony in the case on that issue.

(L) The court erred in admitting the testimony of the witnesses Alexander and Morgan concerning alleged conversations with defendant while he was in solitary confinement charged with the crime of which he was convicted.

(M) The court erred in failing to instruct the jury that before they could find the defendant guilty they must find that he was sane, and in failing to submit the issue of insanity to the jury.

(N) The court erred in stating in the hearing of the jury that as a matter of law the defendant was sane at the time of the homicide.

ERRORS ASSIGNED AND INTENDED TO BE URGED.

(1) The constitutional prohibition against double jeopardy incorporated in the phrase of the Fifth Amendment, "Nor shall any person be subject for the same offense to be twice put in jeopardy of life," is a prohibition directed to the courts of the United States which deprives them of jurisdiction to try any person more than once for his life for the same offense, and neither the consent of the defendant nor the action of any department of the Government can confer a jurisdiction on those courts thus denied by the organic law.

(2) The court erred in overruling the defendant's application to order the cause to be transferred for prosecution to another division of the District of Kansas for the reason that the inhabitants of the district and county in which the trial was had were so prejudiced against the defendant as to prevent an impartial trial within the meaning of the Sixth Amendment to the Constitution of the United States, and that the ruling and decision of the District Court in denying defendant's petition to transfer the cause for said reason violated defendant's rights under the Fifth and Sixth Amendments to the Constitution of the United States.

(3) The court erred in that it overruled and denied the motion of the defendant to quash the panels from which the jury was drawn for the

reason that the members of said panels were present and heard the improper remarks concerning defendant and his counsel made by the district attorney and the judge during the absence of said counsel, and read the newspapers containing said improper remarks and were thereby prejudiced against defendant, and thereby denied to the defenant an impartial trial in violation of his rights under the Sixth Amendment to the Constitution of the United States.

(4) The court erred in that it overruled and denied the defendant's motion praying the court to render judgment in this cause and to discharge the defendant for the reason that the former verdict was set aside upon the confession of the United States acting through the solicitor general and that the failure of the court to enter judgment in accordance with said mandate was a denial to the defendant of the equal protection of the laws and an attempt to deprive defendant of his life without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

(5) The court erred in that in violation of the provisions of Section 275 of the judicial code of the United States prescribing the qualifications of jurors and requiring that such jurors shall have the same qualifications in the courts of the United States in each state respectively as jurors of the highest court of law in such state may have or be entitled to at the time when such jurors for service in the courts of the United States are summoned, it imposed upon the jurors a qualification different from that recognized by the laws of the State of

Kansas by sustaining the challenges of the Government to veniremen Chester Moore, John A. Basgall, J. F. Moherman, William D. Schmidt, Will Myers, E. L. Carson, C. D. Eldridge, Charles Bradshaw, C. C. McCammon, Edward F. Heim, Fred Legler, J. S. Meserve, Elmer E. Manley, John Putman, C. W. Layman, on the ground that said veniremen had conscientious scruples against the imposition of capital punishment in first degree murder cases notwithstanding the laws of Kansas defines murder in the first degree as it is defined by Section 273 of the penal code of the United States, and notwithstanding the laws of Kansas (Section 336 of the General Statutes, 1915) provided that the punishment for murder in the first degree should be imprisonment in the penitentiary for life. That the act of the court denied the defendant the right to be tried by an impartial jury of the State and District of Kansas possessing the qualifications required by law, and this in violation of defendant's rights under the Sixth Amendment to the Constitution of the United States, and that said act denied to the defendant the right not to be deprived of his life without due process of law in violation of his rights under the Fifth Amendment to the Constitution of the United States.

(6) The court erred in overruling the defendant's challenge to veniremen Elmer Williamson and Irving Hill, jurors who were not qualified within the meaning of Section 275 of the United States Judicial Code in that said jurors swore that they would never vote for or concur in a verdict authorizing imprisonment for life in a first degree

murder case but would vote only for the penalty of death and were therefore shown to be jurors who were not qualified to sit on the trial of a charge of murder in the first degree in the highest court of law in the State of Kansas and were not persons possessed of qualifications which would enable them to discharge the duty of jurors in such case in the highest court of law in the State of Kansas; that the court in overruling defendant's said challenge denied to defendant the right of trial by an impartial jury of the State and District of Kansas and this in violation of his rights under the Sixth Amendment to the Constitution of the United States.

7. The court erred in its charge to the jury in that over the objection and exception thereto of the defendant it denied to the jury the right to consider the testimony of the witnesses Whitlach, Beck, Pollard and Boyer, who were not defendant's witnesses and in its charge limited the jury to the consideration of defendant's witnesses only and ignored all facts and circumstances in the case tending to support the special defense of self defense relied upon by the defendant excepting those testified to by defendant's witnesses. And this in violation of defendant's rights under Section 1, Article III, and under the Fifth and Sixth Amendments to the Constitution of the United States.

(8) The court erred in permitting the jury to carry the indictment to the jury room and retain same in their possession during their deliberations on which indictment was the following indorsement: "Vic. Sec. 273, 275, Penal Code of 1910.

Penalty, *Death*; A true Bill." for the reason that said Section 273 defined murder in the first degree only and Section 275 provides that the penalty for the said crime shall be death only, which said indorsement on said indictment amounted to an instruction or charge to the jury that the only charge included in the indictment was the charge of murder in the first degree and an instruction that the only penalty attached to the crime charged in the indictment or any other crime included in that charge, was death, thus misleading the jury into the belief that the only crime of which they could find the defendant guilty was first degree murder and that the only penalty which could be imposed either for such degree murder or for any crime charged in the indictment, was death and thereby preventing the jury from exercising their discretion to qualify their verdict by adding thereto the words "without capital punishment."

(9) The court erred in denying defendant's petition for a rule upon the United States District Attorney to return to defendant letters unlawfully and unreasonably seized and searched after same had been deposited with officers of the government of the United States for transmission through the mails and this in violation of defendant's rights under the Fourth Amendment of the Constitution of the United States.

(10) The court erred in that it admitted that the letters in evidence purported to have been signed by the defendant, after it had taken jurisdiction of the issue, made upon defendant's petition for a rule upon the district attorney to return same to him and heard the evidence conclusively

showing that said letters had been unlawfully and unreasonably seized and searched before the trial of this cause and thereafter over the objection and exception of the defendant, admitted same in evidence in violation of defendant's rights under the Fifth Amendment to the Constitution of the United States.

(11) The court erred in stating in the hearing of the jury at the close of all the testimony that no evidence had been introduced tending to show a justifiable homicide and this notwithstanding testimony had been introduced tending to show that defendant was insane at the time of the homicide and tending to support defendant's special plea of self defense, thus and thereby denying the defendant the right to have the issues in said cause tried by jury and this in violation of defendant's rights under Section 3 of Article II and under the Sixth Amendment to the Constitution of the United States.

(12) The court erred in that it omitted to instruct the jury that if they found and believed from the evidence that the defendant was insane at the time of the commission of the homicide that they must find the defendant not guilty.

ARGUMENT.

(Note: we are discussing questions involved regardless of whether error was regularly assigned or the questions raised were properly raised in the trial court on the theory that in a case where the life of a person is at stake this court will review such questions on the ground that under the constitution of the United States a defendant has the right to a trial of the question of his guilt or innocence by a jury of his peers *without error* according to the course of the common law.

Rule 35 of this court.
Weems v. *U. S.*, 217 U. S. 348.
Crawford v. *U. S.*, 212 U. S. 183.
Moore v. *U. S.*, 224 U. S. 95 l. c. 97.
Hee v. *U. S.* 223 Fed. 732.
Tulder v. *U. S.*, 227 Fed. 833.
Ayer v. *New Mexico*, 201 Fed. 497 l. c. 499).

I.

The constitutional prohibition against double jeopardy incorporated in the phrase of the Fifth Amendment "nor shall any person be subject for the same offense to be twice put in jeopardy of life" is a prohibition directed to the courts of the United States, which operates to deprive them of jurisdiction to try any person more than once for his life for the same offense, and neither the consent of the defendant nor the action of any department of the government can operate to confer upon the courts a jurisdiction thus denied by the organic law.

(a) On the question of double jeopardy in a capital case it was said by the Supreme Court of Georgia:

> "One trial and only one, for each crime, is a fundamental principle in criminal procedure, and must be the general rule practically administered in all free countries. For the public authority, whether king or commonwealth, to try the same person over and over again, for the same offense, would be *rank tyranny*. It *would amount in capital cases, to cruelty, not unlike that of keeping a loaded repeater pointed at the prisoner's head, and, with deadly purpose but bad aim, discharging slowly, one cartridge after another.* Though some exceptions to the general rule are to be admitted, as when a new trial is had on the prisoner's motion, or when the judgment upon a void indictment has been arrested, the transcendent importance of the rule itself requires that *the exceptions should be few and strictly guarded.*"

The prisoner there as in the case at bar did not ask for a new trial. He merely asked that the judgment based on a verdict rendered in his absence be annulled. It was contended that his motion was equivalent to an application for a new trial. Holding that it was not, the court said:

> "This is an effort to draw the prisoner into a second jeopardy as the price of escaping the first. It is hard enough to pay the price where a new trial is actually moved for and granted. *We think such a traffic in jeopardies is not to be considered as conducted by implication.*"
>
> *Nolan* v. *State*, 55 Ga. 521.

The constitution of Georgia provided that "no person shall be put in jeopardy of life or liberty more than once for the same offence, *save on his or her motion for a new trial, after conviction, or in case of mistrial.*" And the court in the above cause limits the exceptions to the rule to those only which were written into the organic law. Justice Bleekly in construing the Georgia constitution gave effect to the principle "that everything in the declaration of rights contained *is excepted out of the general powers of government,* and all laws contrary thereto shall be void." (Cooley Const. Lim. 7 Ed. 68). He might have further illustrated the barbarity on the part of the public authority trying a defendant for his life "over and over for the same offense," in a case where, as here, his life was spared upon a former conviction by an acquittal of capital punishment by saying "It would amount in capital cases, to cruelty not unlike that of keeping

a loaded repeater pointed at the prisoner's head and with deadly purpose but bad aim discharging slowly one cartridge after another and if one of the shots took effect in some other part of his body, which would result in lifelong disability requiring him if he would have a surgeon treat the wound to engage in a traffic in jeopardies which would result in the sale by him to the Government of the protection of the jeopardy which resulted in his wounded body in consideration of his permitting the government with the same deadly purpose and with aim improved by the target practice it had upon his imperilled body to discharge another cartridge at his head."

It is only by virtue of the provisions of the constitution of Georgia that an exception to the provision that "no person shall be put in jeopardy of life or liberty more than once for the same offence" is recognized in that state. And then those exceptions are *rigidly* construed in favor of life or liberty so that a motion to set aside a verdict *without asking for a new trial* will be held, not to be equivalent to a motion for a new trial. This is exactly the situation confronting this court for here defendant asked for annulment of the judgment in his assignment of errors (23-24) and forbore to ask either in this or the lower court for a new trial. This court in *Brantley* v. *Georgia*, 217 U. S. 284, properly upheld a ruling of the Georgia court in which it was held that where a defendant filed a motion for a new trial and the judgment was reversed for failure to grant it he could be properly placed again upon trial under the constitutional exception to the jeopardy pro-

vision. But herein the government is asking this court to write an exception into the Constitution of the United States similar to that by which the people of Georgia and of many other states have repealed the common law on the question (*State* v. *Shiver*, 20 S. C. 392) and broken the force of their constitutional limitations in the respect here involved. That is to say the prosecution insists that this court is empowered to amend the constitution, to make law and to manufacture justice. But at the outset it is well to remember that the power of a court to make law and manufacture justice of a brand to suit its ideas would not be above the just claim of a final judicature if it were not a condition precedent to the exercise of such power and the rendition of such justice that the leading principle on which it must be based is its own discretion. It is axiomatic, however, that neither the life, the liberty or the property of any man should be dependent for its preservation on the discretion of any man or set of men or tribunal for whenever they were so dependent the direct consequence was that the first franchise and right of that human being and all others which vitally depend thereon, was subject to be vitiated for some cause of which no man knows and to be ascertained by no known rule of legal evidence. This is so anomalous not only to the jurisprudence of this country but to that of the English speaking race that no member of that part of the human family ever had his rights vitiated in such manner. It could be supported only by the following method of arguing: This court does not make law. Such power is not contended for. It only declares law and as it is

a tribunal both competent and supreme what it declares to be law becomes law though it was never law before even though it directly contravenes the constitution. Then the circumstance that there is no appeal from its decision is made to imply that it is bound to follow no rule in deciding. The judgment does not desire its validity from conformity to the law but preposterously the law is made to attend on the judgment and the rule is no other than the arbitrary will of the individuals constituting the court; an arbitrary discretion leads, legality follows, which is just the very nature and description of a legislative act and unconstitutional decision.

The decisions of many state courts having constitutional provisions concerning double jeopardy like Georgia and South Carolina, by which the common law on the question has been repealed, or decisions like that of *State* v. *Lee,* 65 Conn. 265 (where the court and legislature were not restrained by any constitutional provision on the point), have doubtless been responsible for some expressions (*obiter* or *arguendo*) which on a cursory examination would lead to the conclusion that this Court had finally committed itself to the doctrine that the constitutional provision does not mean what it says, or that the maxim of the common law on which it is founded meant something different from the plain meaning of the language of the constitution. The dissent in *Kepner* v. *U. S.*, 195 U. S. 100, was based on the reasoning in *State* v. *Lee,* 65 Conn. 265, and this reasoning proceeded on the theory that the common law maxim was merely a dictum of Lord Coke; that the legislature was therefore

not restrained either by a common law maxim *or constitutional prohibition* (this prohibition is excluded from the Connecticut declaration of rights), and that it was the duty of the court to give effect to a statute authorizing the state to appeal in a criminal case.

The confusion in the decisions resulting from the variant constitutional provisions and from the unquestioned rule that the constitutionl prohibition does not prevent a second trial after reversal in *non-capital* cases must be our excuse for reverting to the accepted rules of constitutional interpretation for the purpose of demonstrating that the prohibition of the United States Constitution prevents a second trial upon reversal of a conviction in a *capital case*. The question is not foreclosed by any prior decision of this Court.

A constitution "is not the beginning of a community, nor the origin of private rights; it is not the foundation of law, nor the incipient state of government; it is not the cause, but the consequence, of personal and political freedom; it grants no rights to the people, but is the creature of their power, the instrument of their convenience. Designed for their protection in the enjoyment of the *rights and powers which they possessed before the constitution was made*, it is but the framework of the political government, and necessarily *based upon the pre-existing condition of laws, rights, habits and modes of thought*. There is nothing primitive in it; *it is all derived from a known source*. It presupposes an organized society, law, order, property, personal freedom, a love of political liberty, and enough of cultivated intelli-

gence to know how to guard it against the encroachments of tyranny. A written constitution is in every instance a limitation upon the powers of government in the hands of agents." (Cooley, Const. Lim., 7th Ed., p. 68.)

The known source from which the constitutional prohibition is derived is the common law of England as epitomized by Blackstone.

> "Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England. At the time of the adoption of the Federal Constitution it had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England, so that undoubtedly the framers of the Constitution were familiar with it." (*Schick* v. *United States*, 195 U. S. 69.) See Knote's case, 10 Ct. Cl. 397; Burke on Conciliation.

This Court is committed to the doctrine that the rights of Englishmen at the common law as outlined by Blackstone will be held to be rights which are secured to Americans by the incorporation of common law maxims in the Constitution. (*Kepner* v. *U. S.*, 195 U. S. 100, jeopardy provision; *Callam* v. *Wilson*, 127 U. S. 540; *Traction Co.* v. *Hof*, 174 U. S. 1, jury trial provision; *Chisholm* v. *Georgia*, 2 Dall. 419, l. c. 435, judicial power provision; *Murray's Lessee, et al.*, v. *Hoboken Land Co.*, 18 How. 272, l. c. 276; *Twing* v. *New Jersey*, 211 U. S. 78, due process provision.)

"In ascertaining the meaning of the phrase taken from the Bill of Rights (jeopardy provision) it must be construed with reference to the common law from which it is taken." (*Kepner* v. *U. S.*, 195 U. S. 100.)

"—the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital, not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth." (*Gompers* v. *U. S.*, 233 U. S. 601, l. c. 610.)

"The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed." (*Robertson* v. *Baldwin*, 165 U. S. 275.)

These declarations by this Court are merely reiterations of the rule of juristic interpretation which has ever been followed by civilized nations. It was recognized by the civilians before the laws and language of the English nation became known to men.

"Juristic interpretation is either 'grammatical' or 'logical.' If it is an interpretation of the words as they stand, it is called 'grammatical'; if it is an interpretation of the sense by reference to the content as well as the origin and object of the rule, it is called logical.'

In the logical interpretation of a rule of law the element which has to be considered above all others is the object of the rule, that is, the practical effect intended by the lawgiver. It is the foremost function of the 'logical' interpretation to show clearly the real contents of a rule of law by means of a true perception of its actual conditions and effects; in other words, a logical interpretation should be above all things practical; it should exhibit the material significance of the rule, subjecting it to a keen and searching test in its bearings on things 'divine and human.' * * * To take advantage of the letter of the law—of its grammatical interpretation—in defiance of its sense—that is, its logical interpretation—would constitute a proceeding in *fraudem legis.*" (Sohm, Inst. Roman Law, 2d Ed., p. 30.)

We stress this rule of interpretation for the reason that notwithstanding the grammatical rule (though if adhered to would prevent a second trial) has been discarded by this Court, and for the reason that at common law in non-capital cases a new trial could be had after reversal and the practice of retrying such cases after reversal has become so thoroughly imbedded in the law of this country, both before and since the revolution, that to determine the question by the use of the words

and a dictionary would be "a fraud on the intention" of the framers of the Constitution. Therefore expressions in opinions of this Court or the English courts at common law in *non-capital cases* on the question of double jeopardy are not controlling. The question for decision here is: Whether in a capital case a district court of the United States has power under the Constitution and laws of the United States after reversal of a judgment on error by this Court, which leaves the verdict undisturbed unaccompanied by an opinion indicating that this Court intended that a new trial should be ordered on remand, has power without setting aside the former verdict of conviction to subject the accused to a second trial for his life when no trial was asked by the accused.

This Court has held that there may be second jeopardy in the *same* case.

> "The protection is not, * * * against the peril of second punishment, but *against being tried again* for the same offense." (*Kepner* v. *U. S.* 195, U. S. 100.)

> "The common law not only prohibited a second punishment for the same offense, but went further, and *forbid a second trial for the same offense,* whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted." (Ex Parte Lange, 18 Wall, 163.)

The concrete question now to be determined, to-wit, whether the District Court had power to order a new trial has been negatively answered by

Justice Story in *United States* v. *Gilbert*, 2 Sumn, 39, Fed. Cas. 15204.

> "The question now to be considered is, whether this court has, by the constitution and laws of the United States, authority to grant a new trial in a case circumstanced as the present is. And, in order to free the case as much as possible from any collateral and unimportant considerations, it is proper to state, that in examining this question we shall, for the present, assume that the court had jurisdiction of the case; that there has been no mistrial in a legal sense; that is, no such irregularity or error in impaneling the jury to try the cause or in other proceedings in the course of the trial, as would *upon the face of the process and proceedings be fatal as matter of substance*, and that the indictment is sufficient in point of law to found a just judgment against the prisoners in conformity to the verdict. In other words, for the purpose of the argument, we shall for the present assume that the jurisdiction is clear; that the indictment is good and that the trial has been regularly had and the verdict has been regularly rendered by a competent jury.
>
> Under such circumstances, has this court authority by the constitution and laws of the United States, to grant a new trial after a verdict regularly rendered of guilty, against the prisoners?"

That the court did not understand a misdirection or discovery of new evidence or because the verdict was against the weight of the evidence, or some mere error on the part of the court in ruling upon some matter arising upon the trial, to be

the kind of error as would upon the face of the proceedings be fatal as a matter of substance is shown by the following statement in the opinion:

> "—the total absence of any trace of a motion for a new trial, in any capital case for misdirection of the court, or upon discovery of new evidence, or because the verdict was against the weight of the evidence or for any other causes not amounting to a mistrial where the indictment was good, is perhaps the strongest possible proof, that the power was not supposed to exist in any of the courts."
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> * * * * * * * *
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> "The constitution of the United States has exhibited great solicitude on the subject of the trial of crimes, and has declared, that the trial of all crimes, except in cases of impeachment, shall be by jury; and has in some cases prescribed and in others required congress to prescribe, the place of trial. And certain amendments of the constitution, in the nature of a bill of rights, have been adopted, which fortify and guard this inestimable right of trial by jury. One of these amendments provides that 'no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury,' (with certain exceptions not necessary to be mentioned); and it then proceeds—'nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.' Now the question is, what is the true interpretation and meaning of this latter clause? When, in a constitutional sense, can a person be said to be twice put in jeopardy of life or limb? If resort should be had to the grammatical structure and meaning of the

words, the natural interpretation would certainly seem to be, that no person should be twice put upon trial for any offense, for which he would be liable, upon conviction, to be punished with the loss of life or limb—for jeopardy means hazard, danger, or peril; and when a party is put upon trial for an offense punishable with the loss of life or limb, and he stands for his deliverance upon the verdict of the jury, he is thereby put in jeopardy, hazard, danger or peril of his life or limb. But, fortunately, in the present case, there is no necessity of resorting to mere general principles of interpretation; for the privilege thus secured is but a constitutional recognition of an old and well established maxim of the common law; and, therefore, we are to resort to the common law to ascertain its true use, interpretation and limitation. The existence of this maxim as a fundamental rule of the common law in the administration of criminal justice, may be constantly found recognized by elementary writers and courts of justice from a very early period down to the present times. Thus Staundford, in his pleas of the Crown (lib. 2 c. 36, pp. 105, 106), says: *'Home, per common leye, ne mittera sa vie deux foits in jeopardie de trial per un mesme felonie, sinon que sort en ascun especial cas de quel jeo dirra apres.'* A man shall not by the common law put his life twice in jeopardy of trial for the same felony except it shall be in some special case, of which I shall hereafter speak. And the excepted case, to which he here alludes, he states in the same chapter to be where there is not in the indictment sufficient matter to constitute felony in point of law."

After reviewing the authorities demonstrating that at common law whenever a verdict of conviction was rendered, whether a judgment had been rendered on the verdict or not, the defendant could not be tried again, the court proceeds:

> "Thus we see that the maxim is imbedded in the very elements of the common law; and has been uniformly construed to present an insurmountable barrier to a second prosecution, where there has once been a verdict of acquittal or conviction regularly had upon a sufficient indictment. Indeed, so strong has been the influence of this maxim, that it was for ages construed not only to apply to cases, where there had been a verdict given by a jury; but even where the party had been once put upon his trial before a jury for deliverance.
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> * * * * * * * *
>
> Hitherto we have been chiefly considering the case of a new indictment to which the party pleads the former indictment and a verdict of acquittal or conviction. And it was fit so to do, in order to understand the full import and bearing of the language of the maxim. But the question now more directly presented is, whether the same maxim equally applies to the case of a new trial moved for in a capital case upon the same indictment. It is impossible, I think, to doubt that, in England, the maxim according to the doctrine of the English courts of justice does apply to and govern the case of a new trial. As soon as a capital case is fully committed to a jury, the life of the prisoner is in their hands, and he stands in jeopardy of his life upon the verdict of the jury. He is in the truest sense put upon his deliverance from the peril.

When once the verdict is pronounced the case is fixed. If there is a verdict of acquittal it is generally agreed that he cannot be put upon his trial again for the same offense. And why? Because it contradicts the direct language of this maxim of the common law He would again be put in jeopardy of his life. And how does the case at all differ in principle in the case of a conviction? The fact is the same. He is again put in jeopardy of his life. He is again to be tried, and acquitted or condemned. If it be said, that it is for his benefit and in favor of his life to have a new trial, that may be true; but there is in the body of the maxim no such qualification or limitation of its meaning. It is nowhere laid down as a part of the maxim that if he is acquitted he shall not be tried again; but if he is convicted he may be allowed a new trial. And if the court is to assume the power in favor of the prisoner, why may it not equally assume it when it will prevent a manifest fraud upon the administration of justice to suffer his acquittal to remain? Cases may easily be put where an acquittal may have been produced by gross bribery of the witnesses, by false testimony fraudulently procured by the prisoner, by spiriting witnesses away, and even by means still more offensive and revolting to public justice. And yet no case has as yet been produced of a new trial granted against a prisoner upon such grounds."

* * * * * * * *

—in point of fact, there is no instance of any new trial having been granted by the English courts in capital cases, where the indictment is sufficient, and there has not been a mistrial, upon the plain ground that it would violate the integrity of this fundamental

maxim of the common law. Indeed, for a great length of time the opinion prevailed, that there could be no new trial granted in any criminal cases, even where the indictment was for a mere misdemeanor, although it is manifest that the maxim does not apply except to *capital felonies.*

In *Rex* v. *Mawbey,* 6 Term. R. 638, Lord Kenyon lays it down expressly that 'in one class of offenses, indeed, those greater than misdemeanors, *no new trial* can be granted at all.' In note to the case of *Rex* v. *Inhabitants of Oxford Co.,* 13 East, 416, note (see 2 Hawk. P. C. bk. 2, c. 47; p. 12; and see Mr. Curwood's note, Id.), Mr. East, himself a most able and exact crown lawyer, says: 'In *capital cases* at the assizes, if a conviction take place upon insufficient evidence the common course is to apply to the crown for a pardon, upon a full report of the evidence sent in by the learned judge to the secretary of state for the home department. But I am not aware of any instance of a new trial, granted in a *capital case;* and upon the debate of all the judges in Tincler's Case in 1781 (1 East, P. C. 354), it seemed to be considered that it could not be. And this is admitted to be the received and settled doctrine in England, by every elementary writer upon the criminal law, who treats of the subject. Thus Mr. Chitty says in his work on Criminal Law, that in case of felony or treason, it seems completely settled that no new trial can in any case be granted. But if the conviction appear to the judge to be improper, he may respite the execution, to enable the defendant to apply for a pardon. 1 Chit. Cr. Law (Eng. Ed., p. 654; S. P. Christian's note to 3 Bl. Comm. 388). The like doctrine is stated by

Mr. Russell, in his work on Crimes. 2 Russ, Cr. bk. 6 c. 1, p. 1, (2 Lond. Ed.) p. 589. See also 2 Tidd Prac., p. 820; *Rex* v. *Fowler*, 4 Barn. & Ald. 273; *Rex* v. *Edwards*, 4 Taunt. 309. And to show how inflexibly the doctrine stands in the jurisprudence of the common law, it may be added that in the report made to parliament by the commissioners on the criminal law, at the very last session, it is stated as a known fact, that parties charged with felonies 'cannot have a new trial.' Indeed, the total silence of the English books upon this subject during the last three hundred years is as significant as any positive expression could be. Considering the vast number of capital trials, amounting to hundreds every year, during this long period, the total absence of any trace of a motion for a new trial, *in any capital case* for misdirection of the court, or upon the discovery of new evidence, or because the verdict was against the weight of evidence, or for any other causes not amounting to a mistrial, where the indictment was good, is perhaps the strongest possible proof, that the power was not supposed to exist in any of the courts.

This then was the actual posture of the common law of this subject, and this the received interpretation of the maxim, at the time when it was solemnly incorporated into the constitution of the United States, as an article of the bill of rights. If this clause does not, in legal contemplation, prohibit the granting a new trial after verdict in a capital case, then there is nothing in constitution which does prohibit it, even in cases of acquittal.

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> At all events, if any clause of the constitution does not prohibit the grant of a new trial after verdict in capital cases, there is nothing to prevent congress from investing the courts of the United States with the power of granting new trials in all criminal cases (capital or otherwise), as well in cases of acquittal as of conviction, a power which I imagine, has never hitherto been generally supposed to belong to that body and which is truly alarming, both in its nature and its exercise.
>
> Let us now see how the American authorities stand upon the same subject. And here it is proper to state, that my researches have not enabled me to ascertain a single case, solemnly adjudged in the United States before the adoption of the constitution, in which after a verdict, regularly obtained, a new trial has been granted in a capital case."

The court then discusses decisions of the American Courts pointing out that the constitutions of many of the states have no provision against double jeopardy such as the United States constitution contains. It disagrees with the remark of the Massachusetts Supreme Court in the case of *Commonwealth* v. *Green*, 17 Mass. 515, in which it is said that the question was disposed of as a *question of practice* in the English courts, thus:

> "Now, with the greatest deference for that learned judge, I cannot admit that this language truly represents the state of the English common law doctrine on this subject. On the contrary, as I understand that doctrine, it is no matter of practice at all (usual or unusual), in respect to which the English courts

> are at liberty to exercise any discretion; but it is a matter of power, which a fundamental maxim of the common law prohibits the court from exercising, in all cases (subject to the exceptions already adverted to); and which disability, nothing but an act of parliament can remove. It is a matter of right of every British subject, which constitutes a part of his freedom, like other great rights secured by Magna Charta. If it were a matter of mere practice, there might be some ground for an American court to adopt or reject it. But if it is a great common law right, then it stands upon a very different foundation.

The court illustrates the question involved by referring to decisions in cases where juries were discharged before a verdict was rendered. Among others, the case of *Commonwealth* v. *Cook*, 6 Serg. & R. 577 was cited as an authority thus:

> "—and what makes it still more direct, as an authority there is a provision in the state constitution of Pennsylvania exactly like that in the constitution of the United States. The court held that the discharge of the jury, because they could not agree, was unlawful, and was not a case of necessity within the meaning of the rule on the subject. Mr. Chief Justice Tilghman on that occasion said, where a party 'is tried and acquitted on a bad indictment, he may be tried again, because his life was not in jeopardy. The court could not have given judgment against him, if he had been convicted. But where the indictment is good, and the jury are charged with the prisoner, his life is undoubtedly in jeopardy during their deliberation.' 'I grant that in case

of necessity they (the jury) may be discharged; but if there be anything short of absolute necessity, how can the court, without violating the constitution, take from the prisoner his right to have the jury kept together until they have agreed, so that he may not be put in jeopardy a second time? So that the opinion of the learned chief justice, *a fortiori*, manifestly is, that if a verdict has been once regularly given upon a good indictment, the prisoner could not be tried again. Mr. Justice Duncan was still more full upon the point. After adverting to the case of *People* v. *Goodwin*, and the construction there given to the clause now under consideration, he said, 'I feel a strong conviction that the construction here (there) given to this provision of the constitution of the United States, engrafted into the constitutions of Delaware, Kentucky, and Tennessee, and made an article in the bill of rights of this state, is not the true one, and the provision that no person can be put twice in jeopardy of life and limb, means something more than that he shall not be twice tried for the same offense. It is borrowed from the common law; and a solemn construction it had received in the courts of common law ought to be given to it,' etc., 'This is not the signification of the words used in their common use nor in their grammatical or legal sense. 'Twice put in jeopardy,' and 'twice put on trial,' convey to the plainest understanding different ideas.' etc. 'There is a wide difference between a verdict given and jeopardy of a verdict. Hazard, peril, danger of a verdict, cannot mean a verdict given. Whenever the jury are charged with a prisoner, where the offense is punishable by death, and the indictment is not defective, he

is in jeopardy of life.' And he accordingly held, that in that case the jury, having been discharged, without giving any verdict, for an unjustifiable cause and without necessity, the prisoner was not liable to be tried again. And here I might repeat, *a fortiori*, if the jury had given a verdict he could not be tried again.

The court further discusses the decisions of the state courts and thus concludes:

"Now, whatever diversity of opinion there may be among these learned judges as to the right and power of the court to discharge the jury in a capital case from giving any verdict, except in cases of extreme necessity, all of them agree in this, that after a verdict once given by the jury in a capital case, upon a good indictment, the party cannot be again tried for the same offense; and that such an attempt would be a violation of the constitution of the United States. The judges in Pennsylvania and North Carolina go farther, and deem the case within the prohibition of the constitution, if the party is once put upon trial before a jury, and the jury is discharged without giving a verdict, except in cases of extreme necessity.

* * * * * *

I have always understood that the great object of this clause was, on the contrary, to take away all discretion, and to forbid all courts of the United States from trying a man twice upon a good indictment for the same offense. It has been supposed that in all cases of conviction there may be ground to grant a new trial, because it will always be in favor of the prisoner. If this were true, the difficulty would still remain, that the con-

stitution does not provide for a new trial where it is favorable to the prisoner. If the twice being put in jeopardy is referable only to cases after judgment, and not after verdict; and before judgment, even a new trial may be granted, though it may be unfavorable to him. Cases of conviction may readily be conceived, in which a new trial may be injurious to the prisoner. If, after conviction, it may be granted at his request, it may also be granted without his consent. Suppose a man indicted for murder and convicted of manslaughter; can a new trial be granted at all, unless by putting him twice in jeopardy of his life? Suppose a robbery of the mail, charged in the indictment with being effected by wounding the carrier, or putting his life in jeopardy (which is a capital offense), and there is a conviction of the robbery without such aggravated circumstances, can a new trial be granted, upon the application of the government or of the prisoner? Many other cases of a like nature may be easily put, where the offense in an aggravated form is a capital felony, and without such aggravations not. Yet the power to grant a new trial in cases of convictions, if it exists at all, is general, and may be required by the government as well as the prisoner.

Upon the whole, having given this subject the fullest consideration, I am, upon the most mature deliberation, of opinion that this court does not possess the power to grant a new trial, in a case of a good indictment, after a trial by a competent and regular jury, whether there be a verdict of acquittal or conviction. My judgment is, that the words in the constitution, 'Nor shall any person be subject, for the same offense, to be twice put in jeopardy

of life or limb,' mean that no person shall be tried a second time for the same offense, where a verdict has been already given by a jury. The party tried is in a legal sense, as well as in common sense, in jeopardy of his life, when a lawful jury have once had charge of his offense as a capital offense upon a good indictment and have delivered themselves of the charge by a verdict. In this respect I follow the doctrine of the Supreme Court of New York; and the doctrine of the Supreme Court of Pennsylvania and North Carolina goes not only to the same extent, but includes cases where the party is once put upon his trial before the jury, and they are discharged from giving a verdict without extreme necessity. This, too, is the clear, determinate and well settled doctrine of the common law, acting upon the same principle, as a fundamental rule of criminal jurisprudence. I deem it a privilege of inestimable value to the citizen; and that it was introduced into the constitution upon the soundest principles of prudence and justice. But if it were otherwise, it is my duty to administer the constitution as it stands and not to incorporate new provisions into it. If this clause does not prohibit a new trial, where there has already been a regular trial and verdict, then it is wholly immaterial whether the verdict is of acquittal or of conviction of the offense; and the same party may, in the discretion of the court, be put upon his trial ten, nay, twenty times, if the court should deem it fit. It was (as I think) among other things, to get rid of the terrible precedents on this subject alluded to by Lord Hale, and even acted upon by him, in the reign of Charles II, in discharging juries from giving verdicts upon frivolous or

oppressive suggestions, that this great maxim of the common law was engrafted into the constitution. The constitution has also in another clause declared, that 'no fact once tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law'. The only modes of making this re-examination known to the common law are by a writ of error and a new trial, and if by the common law there cannot be a new trial in a capital case, after a regular trial once had upon a good indictment, as seems to me to be conclusively established by the English authorities already cited, then this clause also carried in its bosom another virtual prohibition.

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It may be thought by some, that there may be great inconvenience in the establishment of this doctrine. But if there be, it is for those who possess the power to amend the constitution to apply the proper remedy. For myself, I entertain great doubts whether, in the actual administration of public justice, the present doctrine would not be far more safe and useful than an unlimited power to grant new trials in all capital cases, at the mere discretion of the court. It may be, that a court may sometimes err in the proper administration of the law; and it may also err in granting or refusing a new trial. But the consciousness that the trial is final, will always impress every court, mindful of its duty, with the utmost caution in all its opinions and judgments in capital cases, where the result may be unfavorable to the prisoner. It will naturally induce it to lean to the side of mercy; and it will look anxiously to the dictates of the law. But still if, after all, errors should

> intervene, it will be but the common infirmity of the administration of all human justice. And the prisoner, even in such a case, will not be wholly without redress. He may apply for a pardon or mitigation of the sentence, to the executives; and it cannot be doubted that the court itself, if conscious of any serious error, would cheerfully aid in his application. Hitherto this ultimate appeal to the pardoning power has been deemed satisfactory and safe in the land of our ancestors down to our own age; and it has been deemed equally satisfactory and safe in all those states whose jurisprudence does not permit a new trial in capital cases under like circumstances.

We submit that this Court should long hesitate before solemnly repudiating any interpretation of the Bill of Rights which has the sanction of the great name of Story written in delivering the opinion of a court of the United States involving the lives of his fellow men.

But our position can be sustained on other authority.

This Court on reversing the case transmitted its mandate directing the District Court to proceed in accordance with the laws of the United States. The only law of the United States which authorizes a court of the United States to grant a new trial is section 269 of the Judicial Code. It was one of the sections of the judiciary act of 1789. Its language is:

> "All of the said courts shall have power to grant new trials in cases where there has been a trial by a jury *for reasons for which new trials have usually been granted in the courts of law.*"

The extent of the power thus conferred must be ascertained by examining the practice which had theretofore been followed in the courts of law in England and in the colonies in *capital cases* with reference to granting new trials. The Court of King's Bench is the highest common law court in England. Lord Kenyon, presiding in that court in 1796, in the case of *R.* v. *Mowbey*, 6 Term., R. 638, said that in *capital* cases "no new trial can be granted at all." To the same effect are the works of practice and the unanimous decisions of the courts of England, including the Privy Council, both before and since the adoption of the constitution. (1 Chit. Cr. Law [Eng. Ed.], p. 654; 2 Russ. Cr., bk. 6, c. 1, X. 1 [2 Lord Ed.], p. 589; 2 Tidd Prac., p. 820; Archbold Cr. P. & P. 177; *Rex* v. *Fowler*, 4 Barn. & Ala, 273; *Rex* v. *Edwards*, 4 Taunt 309; *Rex* v. *Bertrand*, Con. Cr. C. 621; *Reg* v. *Murphy*, 38 L. J. 53.) Nor was a new trial ever granted in a capital case by a colonial court. See note to *Erving* v. *Craddock*, Quincy's Rep., p. 553, l. c. 565 (Mass.); *U. S.* v. *Gibert*, 2 Summ. 39, 25 Fed. Cas. 15204.

But the provision of the Fifth Amendment commanding that "nor shall any person for the same offense be twice subject to jeopardy of life or limb" would render invalid any statute which essayed to give a court of the United States power to grant a new trial in a capital case *(United States* v. *Gibert*, 2 Summ. 39, 25 Fed. Cas. 15204). This for the reason that this constitutional provision preserves to every person about to be tried for his life the common law right to interpose the plea of *autrefois convict* or former conviction.

Blackstone describing "Special Pleas in bar which go to the merits of an indictment, and give a reason why the prisoner ought not to answer it at all, nor put himself upon his trial for the crime alleged," says:

> "1. First, the plea of *autrefois acquit*, or a former acquittal, is grounded in the universal maxim of the common law of England, *that no man is to be brought in jeopardy of his life* more than once for the same offense.
>
> * * * * * * *
>
> "2. Secondly, the plea of *autrefois convict*, or a former conviction for the same identical crime, though no judgment was ever given, or perhaps will be (being suspended by the benefit of clergy or other causes) is a good plea in bar to an indictment, and this depends on the same principle as the former, that *no man ought to be twice brought in danger of his life* for one and the same crime."

The jeopardy clause of the Constitution contains the mandatory word "shall," while Blackstone's statement of the duty imposed upon the courts by a plea of former conviction contains the milder word "ought."

The common law maxim in such cases imposed only a moral obligation on the government according to Blackstone's exposition of it. The word "ought," used as an auxiliary by Blackstone, means "primarily to be bound by practical duty, by the recognized moral laws, or by conscience; by extension to be subject to, or be determined by ideal right or ideal necessities" (Webster's New Int. Dict.) If "Blackstone's

commentaries are accepted as the most satisfactory exposition of the common law of England (*Schick* v. *U. S.*, 195 U. S. 69) by this Court, it follows that in the very selection of the words used to embody the common law maxim the framers of the constitution sought to strengthen the moral obligation of that maxim by the incorporation of the mandatory word "shall" in the constitutional prohibition. At the common law, though no judgment was ever given on the verdict of guilty, and though the judgment was suspended "by the benefit of clergy, *or for any other reason,*" no man could be twice put in danger of his *life* for the same offense. It will be noted that Blackstone's exposition of the maxim limits it to jeopardy of "life." He does not extend it to jeopardy of limb or acquittals or convictions of misdemeanor. This Court has, however, extended the protection to cases of misdemeanor, and the courts of the country (and this Court after *obiter* fashion, however,) have applied the common law doctrine of waiver incident to reversal on error in non-capital cases to capital cases.

It was the rule at common law that if a defendant was acquitted or convicted on a defective indictment, or by a court not having jurisdiction, that the pleas of ***autrefois acquit*** or *convict* were unavailing (*U. S.* v. *Gibert,* 25 Fed. Cas. 15204). But it was also the rule at common law that in a capital case if an indictment was good and the court had jurisdiction that no court could grant a new trial for any cause or reason. That the jeopardy provision of the Fifth Amendment in-

corporated the maxims of the common law in the sense which Blackstone describes in his discussion of the plea of *autrefois acquit* and *autrefois convict* is manifest from a comparison of the language used by Blackstone, and the language of the Fifth Amendment. He says the maxim on which the plea of *autrefois acquit* is grounded is "that no man is to be brought in jeopardy of his life more than once for the same offense," and that the principle on which the plea of *autrefois convict* rests is "that no man ought to be twice brought in danger of his life for one and the same crime."

The word "twice" is taken from the definition of the maxim concerning *autrefois convict*, and the words "jeopardy" and "offense" from the definition of the maxim applicable to former acquittal and incorporated in the jeopardy provision of the Fifth Amendment. Blackstone further says that the plea of former conviction may be interposed irrespective of the causes for which the judgment on the verdict of guilty is nullified or suspended.

That Justice Story correctly stated the law in *U. S.* v. *Gibert, supra,* is shown by decisions of the British Privy Council long after Story had construed the Constitution and laws of the United States concerning the power of the courts to order a new trial in a capital case.

In *Reg.* v. *Bertrand*, 10 Cox. C. C. 621 (decided in 1865), it is said:

> "The course of the general argument for the respondent was of this sort: It seemed not to be very seriously denied that, except for

the precedent of *The Queen* v. *Scaife,* the court below, in making absolute the rule for a new trial, had introduced a new practice; but it was said that this was in analogy with the whole proceeding of our courts of justice in regard to new trials; that as to these, as in many other instances, a wholesome improvement in our law had been made and established; that this improvement had been made in the exercise of a wise discretion, and perhaps inherent powers, for the advancement of justice; that new trials had commenced in civil matters, and advanced in them gradually, and upon consideration, from one class of cases to another; that thence they had passed to criminal proceedings, first where the substance was civil, though the form was criminal, and thence to misdemeanors, such as perjury, bribery, and the like, where both form and substance were criminal. Hitherto it was admitted that they had, except in the instance of *The Queen* v. *Scaife,* stopped short of felonies, but that the principle in all was the same; and that where there was the same reason, the same course ought to be permitted. There may be much of truth in this historical account; and if their lordships were to pursue it into details, it might not be difficult to show how irregular the course has been, and what anomalies, and even imperfections, perhaps, still remain. But they need not do this; it is enough to say they cannot accept the conclusion; what long usage has gradually established, however, first introduced, becomes law, and no court, nor any more this committee, has jurisdiction to alter it."

The very question here involved was decided in the Privy Council case of the *Queen* v. *Murphy*, 38 L. J. 53. In that case the defendant was indicted, tried, found guilty of murder and sentenced to death. Thereafter the Supreme Court in the exercise of its appellate jurisdiction vacated the sentence and gave judgment to the effect that a *venire facias de novo* should issue for the trial of the prisoner upon the indictment because the jury during the trial read newspaper reports of the trial so far as it had gone.

In the syllabus it is said:

> "In a charge of felony where the indictment is good and the prisoner has been given in charge to a jury in due form of law empanelled, chosen and sworn, and a verdict has been returned and a judgment given, the proceedings are final and a *venire de novo* will not lie."

In the opinion it is said:

> " 'When the jury have been brought together, and the prisoner has been given in charge, and the trial has commenced, the right course, if practicable is, that the jury should give their verdict convicting or acquitting the prisoner when the jury have once found a verdict of conviction or acquittal, the matter has become *res judicata*, and after that there can be no further trial.' He further shows that a *venire de novo* on the same indictment would be erroneous, and a new indictment on the same charge would be defeated by a plea of *autrefois acquit* or *convict*. These remarks relate to a verdict returned upon a good in-

> dictment for felony before a competent tribunal. Their Lordships cite the statement of the law to show the finality of a verdict upon a charge of felony when the indictment is good and the prisoner has been given in charge to a jury in due form of law, empanelled, chosen and sworn, and a verdict of conviction or acquittal has been returned.
>
> In the present case, if the prisoner should have been tried and convicted upon the *venire de novo* ordered to issue by the rule here appealed against, according to the passage just cited, a judgment thereon would be erroneous."

In the foregoing part of the opinion the point is discussed on the theory that a new trial can be awarded by a court of error only where the indictment is bad or where there is a defect of jurisdiction in respect of time, place or person or the court is improperly organized or the verdict is so ambiguously expressed a judgment could not be founded thereon.

The well considered decisions of the state courts are in accord with Justice Story on the question. tion.

In *Sheperd* v. *People*, 25 N. Y. 406, it is said:

> "But by the common law a new trial could be granted in a case of felony, when there had been a mistrial relating to the regularity of the organization of the court, or of the impanneling of the jury, or, perhaps, conduct of the jury. Thus, in Arundel's case (6 Coke, 14) where the defendant had been tried by a jury, returned from a certain city, instead of a certain parish, and had been convicted and moved in arrest of judgment on that ground, it was

adjudged that the jury ought to have come from the parish, and not the city, and that the trial was insufficient, and a new venire was awarded to try the issue again. So, in the case of *The People* v. *Kay* (18 John., 212), where the defendant was indicted, tried and convicted of murder, and moved in arrest of judgment on the ground that the venire which had been issued was a nullity, and the court adjudged that it was a nullity, a new trial was ordered. In his opinion in this case, Chief Justice Spencer refers to a case as having occurred within his knowledge, where the defendant was tried and convicted of murder, and a new trial was granted on the ground of the misconduct of the jury in separating, after agreeing, and before rendering their verdict. So in the Cancemi case (18 N. Y. 128), since the Revised Statutes, where the defendant, with his own consent, was tried and convicted of murder by a jury consisting of but eleven jurors, the judgment was reversed and a new trial ordered. There was a bill of exceptions in this case; but the judgment was reversed and a new trial ordered on the record alone.

In all these cases, the new trial was awarded on the ground that there had been no lawful trial; on the ground of irregularity in the impanneling or conduct of or organization of the jury; and on the record alone. In the principal case, the indictment was sufficient; the court at which the defendant was tried was a court of competent jurisdiction; the jury were regularly impanneled, and rendered a lawful verdict; and the judgment, if reversed, must be reversed upon the record alone, and upon the ground alone that a wrong judgment was given upon a lawful and regular verdict; and the question is whether, is such a case, the court should order a new trial. In view of the pro-

vision of the Revised Statutes above referred to, expressly authorizing the court, upon reversing the judgment, to either direct a new trial or that the prisoner be discharged, I think the court should not direct a new trial, if the prisoner could plead his former regular trial and conviction in bar of another trial. The circumstance, that the counsel of the prisoner, on moving in arrest of judgment, also asked for a new trial, I regard of no consequence. The constitutional provision is, 'No person shall be subject to be twice put in jeopardy for the same offense.' (Const. of State, Art. 1. ..6). This provision may be considered as addressed to courts; and, if the prisoner is within its protection, he ought to be discharged, although his counsel did formally ask for a new trial.

The question is, then, whether the prisoner, if the judgment is reversed upon the ground alone that a wrong judgment was given upon a lawful and regular trial and conviction, can constitutionally be tried again. It is clear to me that he cannot. In the case of *The People* v. *Taylor* (3 Denio, 97) Judge Bronson said, 'If a wrong judgment be given against a defendant, which is reversed on error (there being no bill of exceptions, the court of review can neither give a new judgment against him nor send the case back to the court below for a proper judgment'—citing *The King* v. *Bowne* (7 Adol. & El., 58) *Shepherd* v. *Commonwealth* (2 Metc. 449); *Christian* v. *Commonwealth* (5 Id. 530) and *The King* v. *Ellis*, (5 Barn & Cres., 395). These cases fully establish the rule as stated by Judge Bronson. In the case of *O'Leary* v. *The People* (4 Park. Crim., 187), where the prisoner was regularly tried, and the jury rendered a verdict which

would have authorized a judgment as upon a conviction for a simple assault and battery but did not authorize the judgment which was rendered as upon a conviction for a felony, the Supreme Court, upon reversing the judgment, on writ of error, discharged the prisoner, referring to Judge Bronson's opinion in *People* v. *Taylor*.

These cases are probably sufficient to show that a new trial should not be directed in this case; but in view of the provision of the statute, which was not referred to either in *People* v. *Taylor*, or the case last cited, and in view of the great importance of the question in this case not only, but in other capital cases, in which the question has arisen, since the Act of 1860, I shall examine the question further.

In 1 inst., 391, a, it is said: 'The difference between a man attained and convicted, is, that a man is said convict before he hath judgment, as if a man be a convict by confession, verdict, or recreancie. And when he hath his judgment upon the verdict, confession, etc., then he is said to be attaint.' It is further said: 'By a conviction of a felon his goods and chattels are forfeited, but by attainder, that is, by judgment given, his lands and tenements are forfeited and his blood corrupted, and not before.' So in Jacob's Law Dictionary (Attained) it is said: 'Attainder of a criminal is larger than conviction; a man is convicted when he is found guilty or confesses the crime before judgment had, but not attained till judgment is passed upon him.' This shows the technical, common-law definition of the word convict or convicted; a felon was convicted by the verdict of a jury; he was attainted by the judgment rendered on the verdict.

One would think, from this common law definition of the word convict or convicted, that, by the common law, the plea of *autrefois convict* implied merely a regular trial and verdict of guilty, or a confession upon a sufficient indictment. I think the books show that this was so. In Darly's case (4 Coke 40) one Wetheral brought an appeal against Darly of Minden. The defendant pleaded not guilty, and was found guilty of homicide and had his clergy; and afterwards was indicted for murder, and he pleaded his former conviction in the appeal at the suit of the party; and it was adjudged a bar, and thereupon he was discharged, 'because a man's life should not be twice put in jeopardy for one and the same offense.'

In Vaux's case (4 Coke, 45), it is said: 'If a man is convicted either by verdict or confession upon an insufficient indictment, and no judgment thereupon given, he may be again indicted and arraigned because his life was never in jeopardy,' etc. This implies, if the indictment is sufficient that the conviction is a bar, though no judgment is given upon it. The same case shows that a lawful conviction by verdict on an insufficient indictment, followed by a judgment, is a bar to a second trial until the judgment is reversed. Hawkins (P. C. book 2, ch. 36, p. 10) says: 'The plea of *autrefois convict* seems chiefly to depend on the reason, that the party ought not to be brought twice into danger for the same crime. Upon which ground, it seems agreed, that a conviction on an appeal or indictment of burglary or other felony may be pleaded to an indictment or appeal for the same felony.' Again he says (15 of same ch.): 'But it seems clearly settled that, when

ever the record on which a man is convicted of manslaughter and admitted to his clergy, on an indictment or appeal of murder, is erroneous, either in respect of insufficiency in the indictment or for a mistrial, etc., so that his life was not in danger at the trial, he can not plead such conviction and clergy thereon in bar of a second indictment or appeal.'

Blackstone (4 Bl. Com. 336) citing Hawkins, says: 'The plea of *autrefois convict,* or a former conviction for the same identical crime, though no judgment was ever given or perhaps ever will be, (being suspended by the benefit of clergy or otherwise), is a good plea in bar.'

Chitty says: 'In order to plead this plea (*autrefois convict*) with effect, the crime must be the same for which the defendant was before convicted, and the conviction must have been lawful on a sufficient indictment. And if he has neither received sentence nor prayed the benefit of clergy, this plea is said not to be pleadable, if the former indictment were invalid.' (1 Chitty Crim. L. 462.)

In the case of the *People* v. *Barrett* (2 Caines, 304), where the prisoner had pleaded to the indictment, the jury been sworn and evidence offered, and the public prosecutor, without the prisoner's consent, had withdrawn a juror because he was unprepared with his evidence, it was held that the prisoner could not afterwards be tried on the same indictment. Held, that he might be tried on another indictment for the same offense (1 Johns, 66), where it appeared that the first indictment was defective.

In the case of the *People* v. *Casborus* (13 John, 351), it was held, that the former indictment and trial was no bar where the

judgment had been arrested, but this was upon the ground that it was presumed that the judgment was arrested on the ground that the indictment was defective.

In *State* v. *Benham,* (7 Conn. 414), where the judgment was suspended it was held that the verdict constituted the bar.

In *State* v. *Morrell* (2 Yerg. 24), that the verdict was a bar when the judgment was improperly arrested upon a good indictment.

In *Dyer* v. *Commonwealth* (23 Pick. 404), there was a special verdict which did not authorize the judgment entered on it, and the judgment was reversed and the prisoner discharged.

In the *People* v. *Goodwin,* (18 John., 202), Chief Justice Spencer said that the rule that no person shall be subject for the same offense to be twice put in jeopardy of life or limb, meant that 'no man shall be twice tried for the same offense.'

See also *People* v. *Comstock,* 8 Wendall 549.

No statute of the United States essays to authorize a United States Court to grant a new trial in a capital case.

Section 269 of the Judicial Code providing that "all of the said courts shall have power to grant new trials in cases where there has been a trial by a jury for reasons for which new trials have usually been granted in the courts of law," was one of the sections of the original judicial code of 1789. Justice Story points out that it did not enlarge the powers of the Federal Courts in capital cases but expressly restricted the power of those

courts to the granting of a new trial in cases only in which new trials were granted at common law. The other provisions of the Judiciary Act, authorizing the Supreme Court and the Circuit Courts on reversal, to proceed to render such judgment or pass such decree as the district court should have rendered or passed (1 Stat. 85, Sec. 24) manifestly did not give the Supreme Court any greater power than the district courts. It merely gave the Appellate Court the same power which had theretofore existed in the district court and the district court was without authority to grant a new trial in a capital case. Section 25 of the Act of 1789 giving this court power to review judgments of state courts in capital cases conferred such power upon this court as resided in the state courts in such cases and since the constitutions of the states could or could not authorize the state courts to grant new trials in capital cases the analogy drawn by this court in the case of *Ballew* v. *United States*, 160 U. S. 187, in discussing its power in noncapital cases, is not applicable. The fact that Congress in the first judiciary act specifically legislated upon the question of new trials and restricted the power of courts under the statute to the power vested in the courts at common law, demonstrates that it did not intend by other sections of the judiciary act inferentially to grant power to the courts it had thus specifically denied. It is a well known rule of statutory construction as it is of constitutional interpretation, that a specification of particulars is an exclusion of generals or the expression of one thing is the exclusion of another. It is also a

recognized canon of interpretation applicable to a statute that the courts are forbidden to assume without clear reason to the contrary that any part of a statute or any section of a statute is superfluous. If, therefore, a power to grant new trials in capital cases could be held to be incorporated by implication in some other provision of the judicial code or the original judiciary act the court is driven to the conclusion that section 269 of the Judiciary Code is superfluous and has always been wholly useless. The statutes providing for the powers and duties of this court upon reversal, give it power to affirm, to modify or reverse any judgment, decree or order of a district court or to direct such judgment, decree or order to be rendered or such further proceedings to be had by the inferior court as the justice of the case may require, cannot therefore authorize a new trial in a capital case. (Sec. 701, R. S., U. S. Act of June 1, 1872; 17 Stat. 196; Sec. 709, R. S., U. S. Act of Feb. 6, 1889, 25 Stat. 655; Act of March 3, 1891, 26 Stat. 826.) By the act of March 3, 1879, 20 Stat. 354, jurisdiction was conferred on the district court where the sentence was fine or imprisonment to try such cases *de novo*. This section did not refer to capital cases. The act of February 6, 1889, 25 Stat. 655, gave this court authority in capital cases upon the application of the defendant on writ of error to re-examine, reverse or affirm the judgment of the lower court, and to remand same for further proceedings in accordance with the decision of the supreme court. That statute then specifically provides that "the court to which such cause is so remanded shall

have power to cause such *judgment* of the Supreme Court to be carried into execution." That statute manifestly contemplates that a judgment disposing of the issues must be rendered by this court upon reversal of a capital case. A mere direction to the lower court to grant a new trial would not be a judgment. It is significant that notwithstanding the act of the British parliament establishing the court of criminal appeals contains provision authorizing said court on a case reserved or authorizing any court having jurisdiction of a writ of error in any criminal case "either to pronounce the proper judgment or to remit the record to the court below, in order that such court may pronounce the proper judgment upon such indictment, information, presentment, or inquisition." (11 and 12 Vict., c. 78, Sec. 5) has never been held to authorize either an English trial court or court of errors to grant a new trial in a capital case. Section II of said act authorizes the court of criminal appeal upon a case reserved "to reverse, affirm or amend any judgment which shall have been given on the indictment or inquisition on the trial whereof such question or questions have arisen—or to avoid such judgment, and to order an entry to be made on the record, that in the judgment of the said justices and barons the party convicted ought not to have been convicted—or to arrest the judgment —or order judgment to be given thereon at some other session of oyer and terminer or jail delivery, or other sessions of the peace, if no judgment shall have been before that time given, as

they shall be advised—*or to make such other order as justice may require.*"

These statutory provisions here of England's Parliament have been eulogized by a leading British text writer as establishing

> "—the greatest improvement which has, perhaps, ever been made in the administration of our criminal law, so far as relates to indictable offences" (Archbold Cr. P. & P. 194, 7th Ed.).

Yet those provisions have never been construed to authorize either the courts of error or the court of Criminal Appeals to grant or direct the trial court to grant a new trial in a capital case.

This Court in *Kepner* v. *U. S.*, supra, has categorically approved the definition of former jeopardy formulated by Justice Story in *Sumner* v. *Gibert, supra,* citing that case. This demonstrates that the Constitution has erected a jurisdictional barrier by the jeopardy provision of the Fifth Amendment over which the jurisdiction of the trial court could not leap for a jurisdictional question can never be waived (*U. S.* v. *Shick,* 195 U. S. 69). Where the second trial is on the same indictment the lack of jurisdiction is patent on the face of the record and the court is bound to take judicial notice thereof. (*Golding* v. *State,* 23 Fla. 262; *In re Bennet,* 84 Fed. 324; *Reg* v. *Murphy,* 28 L. J. 53.) The record itself constitutes the plea of former conviction.

Those barriers which the Constitution has erected for the protection of the lives of its citizens and over which the criminal jurisdiction of the

courts cannot climb cannot be waived. No man can waive a fundamental constitutional right on which the preservation of his life depends. The natural life

> "cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures merely upon their own authority." (1 Bl. Comm. 133; *Hopt* v. *Utah*, 110 U. S. 579; *Thompson* v. *Utah*, 170 U. S. 3430; Cooley, Const. Lim., 391.) The public has an interest in his life and liberty. Neither can be lawfully taken from him except in the manner prescribed by law. That which the law makes essential in proceedings involving the definition of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods. The great end of punishment is not the expiation or atonement of the offense committed, but the prevention of future offenses of the same kind. (4 Bl. Comm. 11.)" (*Hopt* v. *Utah*, 110 U. S. 202; *Lewis* v. *U. S.*, 146 U. S. 370; *Thompson* v. *Utah*, 170 U. S. 346; Cooley, Const. Lim. 319.)

We submit that, under the foregoing authorities, the law is properly stated in Sections 1043 to 1047, inclusive, of Bishop's New Criminal Law, which follow:

> "Prohibition of Second Jeopardy implies what: This guaranty of immunity from a second prosecution is, in its nature, a restraint on the courts, not on the party. It would be absurd to promise a man protection from his

own act, but reasonable to make the like promise as to the act of another. Moreover, it implies that in the absence of any willingness in fact, a court shall not set before him the alternative of doing what amounts to a consent to be put in jeopardy any number of times, or lose his life or liberty from a verdict wrongly rendered because of a misdirection from, it may be, an utterly incompetent judge. To say to a prisoner, 'Be hung contrary to law, or consent to be put in jeopardy a second time,' is, it is submitted, utterly to disregard the implications in this provision of the Constitution. Further as to

Misdirection Taking Away Jeopardy: The underlying principle of great numbers of our decisions is that an error from the bench in a trial prevents the jeopardy from attaching to the prisoner; since, should the verdict be against him, he is entitled to have it set aside. This interpretation overlooks the fact that our constitutional guaranty is a restraint upon the courts, and that it forbids them to make a blunder which shall compel one to ask a second trial. When the Constitution declares that the State shall not put him in jeopardy twice, it is a mockery to say that it may bring him into as many jeopardies as it will, provided it misstates the law to the jury each time. The interpretation which makes a breach of the common or statutory law a good answer to a charge of violating the Constitution has no parallel in anything else known in our jurisprudence.

In Principle: When by valid steps the State has brought an accused person to trial, and it is ready to be commenced, he is in jeopardy unless some patent or latent things not under the control of this prosecuting power

or its agent exists, rendering it impossible a verdict good in law should be rendered against him. The valid preparation and instantaneous readiness to begin to receive evidence is the jeopardy—not the verdict, which is the consummation of the proceedings; for the final judgment is a mere formal utterance of the law's approval of what is already done. Now, if the power which brings a man into and controls the jeopardy—namely, the State and its agent the court—proceeds unlawfully after the jeopardy has thus attached, it is not sound in legal reasoning to say that this unlawful conduct nullifies the jeopardy. If it did, then the process might be repeated forever, and the constitutional guaranty be rendered void. And we may presume it was to prevent exactly this sort of thing that the constitutional inhibition was established.

Failure of Evidence: on the part of the State, it is admitted, will not nullify the jeopardy. But if to strengthen inadequate proofs against the prisoner, the judge opens to the jury the gossip of the neighborhood, and he is convicted, has he not been equally in jeopardy, and shall he not be equally protected from the hazard of a second trial? 'Oh,' say the courts, 'he has now been convicted, and wrongly, and if he will consent to the hazard of being convicted rightly, he may have the first wrong, namely, the verdict illegally procured, set aside and enter into a realization of the second wrong, which consists of being compelled to relinquish a constitutional right or suffer an unlawful hanging or imprisonment.' Such, on the one hand, is the doctrine of the Constitution; and such, on the other hand, is that of the courts.

These Views: show that the course of the courts, apparently adopted unthinkingly, or

> trying anew defendants wrongly convicted by reason of a misdirection against which they protested, instead of suffering them to go free, violates our constitutional guaranty. If only on the waiving of their constitutional rights they can have the error corrected; if they can be permitted to take their due only on paying the price of surrendering what the Constitution secures to them; if after they have struggled against misdirection in the cause, and been borne down, they can be permitted to come up again only on giving back what the Constitution of the country gave them; if, having opposed a conviction improperly ordered, while entitled to an acquittal, they can have the conviction under a different state of facts appearing, when either they will be unprepared for the trial or the government will have evidence it had not before; if the wrong done the prisoner is to be set right only on his 'consenting' to receive a fresh wrong, surely this guaranty of the Constitution is worth but little."

There is another consideration which must result in sustaining the contention of the defendant to the effect that the District Court could not again try him after reversal. It appears that the plaintiff in error did not bring about the destruction of the former *verdict* or judgment. The United States, acting through its Solicitor General, filed a motion moving that the court reverse the judgment, and in pursuance of the *confession and motion on the part of the United States* the judgment was reversed and remanded for further proceedings. Consequently the fallacious doctrine of

waiver of former jeopardy does not fit the facts of this case. In 16 C. J. 258 it is said

> "It is only where the accused has brought about the destruction of the first verdict that he can be tried again for the same offense, and where the court on its own motion sets aside a valid verdict rendered by a jury regularly obtained and impaneled upon a sufficient indictment, defendant will be protected from a subsequent prosecution for the same offense."

People v. *McGrath*, 202 N. Y. 445.
State v. *Snyder*, 98 Mo. 555.
Ex Parte Snyder, 29 M. A. 256.
State v. *Adams*, 11 S. D. 431.
State v. *Norvell*, 2 Yerg. Tenn. 24.
State v. *Parish*, 43 Wis. 395.

The Government asks this Court to affirm the judgment herein and thereby to violate the constitutional mandate which prevents the Government from subjecting any person to jeopardy of life or limb a second time for the same offense. The many decisions which may be cited in support of the Government's contention cannot relieve the court of its responsibility in determining the plain meaning of this provision as applied to the facts herein from a reading of the Constitution itself. "To shed the blood of our fellow creature is a matter that requires the greatest deliberation and the fullest conviction of our own authority; for life is the immediate gift of God to man; which neither he can resign, nor can it be taken from him, unless by the command or permission of Him who gave it; either expressly revealed, or collected

from the laws of nature or society by clear and indisputable demonstration." (Bl. 4, 11.) "The guilt of blood, if any, must lie at their doors, who misinterpret the extent of their warrant; and not at the doors of the subject who is bound to receive the interpretations that are given by the sovereign power." (*Ibid.*) To say that defendant was never in jeopardy at the former trials, is to say what is not true. "There is a wide difference between a verdict given and jeopardy of a verdict. Hazard, peril, danger of a verdict, cannot mean a verdict given. Whenever the jury are charged with a prisoner where the offense is punishable with death and the indictment is not defective, he is in jeopardy of his life. His life is in jeopardy on every question taken by the jury among themselves. While they are deliberating whether he shall live or die can it be said that his life is not in jeopardy? His chance of life fluctuates during their deliberations." (6 Serg. & Rawle, 577.) Chief Justice Tilghman, in denying a new trial on the question of jeopardy in that murder case, said:

> "For my own part, *thinking that their blood would be upon us if they were convicted of murder in the first degree on a second trial* in this court, I am of opinion that they should be discharged from this indictment."

(b) This court has never in any case in which the question was properly before it decided that a Court of the United States has power to grant a new trial in a capital case. The question here presented is yet open.

The first act of Congress which authorized a criminal case to be brought from a Circuit Court of the United States to this Court except upon a certificate of a division of opinion, was the act of Feb. 6, 1889, c. 113, sec. 6 (*U. S.* v. *Sanges,* 144 U. S. 310). For this reason this Court could not have been called upon prior to that time to determine the question here presented. The question never was raised in any case coming to this Court in any other variety of proceeding from a court of the United States in which the judicial power of the United States was vested. *Hopt* v. *Utah,* 104 U. S. 631; 110 U. S. 574; 114 U. S. 488; 120 U. S. 430, came from a territorial court. A territorial court is not a reservoir of the judicial power of the United States (*McAllister* v. *U. S.,* 141 U. S. 174). The Utah court consequently derived its judicial power not from the constitution but from the act of the legislature prescribing its functions. Its powers were therefore subject to different limitations from those of a District Court. The Hopt case was capital and three new trials were had after reversal. But the Utah statute expressly empowered the territorial court to grant new trials in capital cases. As it was a statutory court it was bound to proceed according to the law of its creation. But the question of double jeopardy was not raised either in this or in the territorial court. This Court is committed to the

doctrine that when a question is passed upon *sub silentio* it does not consider itself bound by the prior decision and will overrule it if upon full investigation of the point involved it be found to be erroneous. *(U. S* v. *Moore,* 3 Cranch 159, 172, per Marshall, J.; *U. S.* v. *Sanges,* 144 U. S. 310.)

The next case in which the question of double jeopardy was involved is *Ball* v. *U. S.,* 163 U. S. 662. In that case upon writ of error *the indictment was found to be defective* when the case first reached this Court (140 U. S. 118). This Court ordered the indictment dismissed for that reason. At the second trial on a new indictment the plea of former conviction was invoked and denied. This Court properly affirmed the action of the District Court for the reason that legal jeopardy cannot attach *unless the indictment be valid.* A person is in legal jeopardy when he is put upon trial, before a court of competent jurisdiction, upon indictment, or information which is *sufficient in form and substance to sustain a conviction,* and a jury has been charged with his deliverance. And a jury is said to be thus charged when they have been impanelled and sworn." (Cooley, Const. Lim., 7th Ed., 467; *Kepner* v. *U. S., supra.)*

The court in the Ball case goes on to say that a person who procures a judgment against him upon an indictment to be set aside may be tried anew upon the same indictment. This statement was *arguendo.* There the trial was had upon a *new indictment* after the first had been held invalid by this Court. Here the trial was had upon the

same indictment after it had been held valid by this Court. The court cited the *sub silentio* opinions in Hopt's case. But as we have shown those opinions were not authority. It also cited *Regina* v. *Drury*, 3 Cox. Cr. Cas. 544. But that was *not a capital case* and it is conceded on all hands that new trials could be granted at common law in cases not capital. Furthermore the authorities relied on in that case were discredited in *State* v. *Norvell*, 2 Yerg. 24, where the court points out that the constitution tolerates no vacillation in the application of its jeopardy provision.

At common law the right was restricted to the highest crimes (*U. S.* v. *Gibert*, 25 Fed. Cas. 15204; Black Const. Law 2d Ed. 586). Hence, *Regina* v. *Drury*, rendered on circuit, *supra*, is not authority, particularly since the later decisions of the Privy Council in *Reg.* v. *Bertrand*, *supra*, and *Reg.* v. *Murphy*, *supra*, in passing on the power of the court in *capital cases* have not questioned the propriety of the Drury decision applying the different principles applicable to non-capital crimes.

The court also cites *Com.* v. *Gould*, 12 Gray 171. That case merely held that where a motion to quash a prior indictment was sustained the defendant could not avail himself of the plea of former jeopardy. Furthermore, the Constitution of Massachusetts differs from that of the United States. The citation of the last authority demonstrates that the *arguendo* or *obiter* language of the Ball opinion was based upon a decision in a case where under all authorites jeopardy had never attached, for the jury had never been sworn, and consequently the Ball decision on the question

here presented has no force whatsoever and is not even to be respected.

The question was next discussed in *Trono* v. *U. S.*, 199 U. S. 421, in which it was held that by virtue of a statute giving the Supreme Court of the Philippine Islands appellate jurisdiction both as to law and fact that the Supreme Court of those islands was merely exercising the jurisdiction conferred upon it by the law of its creation when it reversed the finding of the Court of First Instance on the preliminary hearing. It appears from the sentences imposed that the crime was not capital under the laws of that jurisdiction. This Court erroneously assumed that the question could be disposed of as though it arose in one of the Federal Courts of this country. It cited the case of *U. S.* v. *Harding*, Fed. Cas. No. 15301, where the court orally warned prisoners not to ask for a new trial on a charge of manslaughter lest they should be subject to a higher penalty. The court also cited the *obiter* language of the Ball decision on the old waiver theory. It also cited the decision in *People* v. *Palmer*, 109 N. Y. 413, where the court held that as the right of appeal was not a constitutional right but only statutory it was competent for the legislature to attach any condition it saw fit to the exercise of the right. *People* v. *Palmer* was discredited in the later case of *People* v. *Cignorale*, 110 N. Y. 23. But this Court in the later case of *Ocampo* v. *U. S.*, 234 U. S. 91, which also came to this Court from the Philippine Islands, unanimously put its affirmance on the correct ground, to-wit, that the statute creating the Philippine courts vested appellate jurisdiction as

to the law *and the facts* in the Supreme Court of those islands and that the hearing was preliminary. The later decision in effect overrules the earlier, in which there was a vigorous dissent. In the Trono case it was properly held that as all the power of the lower and upper courts was statutory and without constitutional limitation, the legislature might attach such conditions as it saw fit to the exercise of the right of appeal. Something similar might be said of *People* v. *Palmer*, where such conditions were attached. But these decisions are no authority here, because Congress has attached no condition to the right of a convicted defendant in a capital case to prosecute a writ of error; and while Congress may grant new rights to a convicted felon, it cannot diminish or take away any right secured by the Constitution. It may not be amiss in this connection to quote from *Cohen* v. *Virginia*, 6 Wheat. 397:

> "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, *but ought not to control the judgment in a subsequent suit when the very point is presented for decision.* The reason of this maxim is obvious. The question actually before the court is investigated with care and is consid ered in its fullest aspect. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

These principles are applicable to the other capital cases which have reached this Court and on reversal were remanded for new trials. Examination will disclose that the question now presented was passed *sub silentio* or was not in issue. But it may be contended that the practice of this Court has made that lawful which was unlawful in its inception and that long recognized error has become sacred because the courts have sanctioned it and thereby given it a vested right to existence. But this Court has in *Ex parte United States*, 242 U. S. 27, given this outworn contention its quietus:

The court devotes the fourth subdivision of the opinion to a consideration of the legality of a long continued practice on the part of the courts in suspending the execution of a sentence. Said the court:

> "—it cannot be denied that in both the state and Federal Courts, over a very long period of time, the power here asserted has been exercised, often with the express, and constantly with the tacit, approval of the administrative officers of the state and Federal Governments, and has also been tacitly recognized by the inaction of the legislative department during the long time the practice has prevailed, to such an extent that the authority claimed has in practice become a part of the administration of criminal law, both State and Federal, not subject to be now questioned or overthrown because of mere doubts of the theoretical accuracy of the conceptions on which it is founded.
>
> * * * * * *

> Albeit this is the case, we can see no reason for saying that we may now hold that the right exists to continue a practice which is inconsistent with the Constitution, since its exercise, in the very nature of things, amounts to a refusal by the judicial power to perform a duty resting upon it, and, as a consequence thereof, to an interference with both the legislative and executive authority as fixed by the Constitution. The fact that it is said in argument that many persons, exceeding two thousand, are now at large who otherwise would be imprisoned as the result of the exertion of the power in the past, and that misery and anguish and miscarriage of justice may come to many innocent persons by now declaring the practice illegal presents a grave situation. But *we are admonished that no authority exists to cure wrongs resulting from a violation of the Constitution in the past, however meritorious may have been the motive giving rise to it, by sanctioning a disregard of that instrument in the future.*"

Furthermore, "error is not sacred; it has no vested right to existence and it becomes us as men, certainly as judges, whenever error is discovered for the first time, to confess and forsake it at the earliest opportunity." Prov. XXVIII, 13 (Per Sherwood, J., 86 Mo. l. c. 437).

(c) To hold that a person convicted of a capital crime by prosecuting a writ of error, waives his right to rely on the constitutional prohibition against double jeopardy is to hold that this constitutional guarantee can never be invoked by a person so convicted.

If a defendant convicted of a capital offense in this country cannot rely on the plea of *autrefois convict* in any case where he procures the reversal of the judgment of conviction on writ of error, then the right to this common law guaranty is excluded from the constitutional jeopardy provision and can never be relied upon by any person in any such case. It was one of the rights of an Englishman at common law in Blackstone's day to rely upon the plea of *autrefois convict* in cases where he obtained the suspension of the judgment "by the benefit of clergy or other causes." (Bl. B. IV 336.) But the Act of April 30, 1790, ch. 9 (1 Stat. L. 119) provided that "The benefit of clergy shall not be used or allowed upon conviction of any crime for which the punishment is death." This Act prevented every person so convicted in any capital case in a Federal Court from availing himself of that common law right, for the reason that only death or a pardon could prevent the infliction of the death penalty upon conviction on a valid indictment where the court had jurisdiction of the cause at common law. If the convicted person were pardoned, then the proper plea in bar would be the pardon and not the former conviction on which the pardon operated (Bl., Bk. IV, p.

402), and if he died of course he could not be again put in jeopardy.

It follows that the reversal of a judgment on writ of error should be followed by the same consequences as the granting of a convicted felon's prayer for the benefit of clergy. In *Hartung* v. *People*, 26 N. Y. l. c. 187, it is said, per Elliott, J.:

> "The reversal in this court of the former judgment in this case is strongly analogous to the result of praying benefit of clergy in England in its consequences."

If the prayer for the benefit of clergy in a capital case at common law did not when granted amount to a waiver of the protection of the common law maxim it is difficult to understand how a court bound by a constitutional limitation by which that maxim is raised to the dignity of a fundamental law can by its mere *ipse dixit* strike down the constitutional protection. The liberal rule of construction applied to the constitutional guaranties (*Boyd* v. *U. S.*, 116 U. S. 524; *Counselman* v. *Hitchcock*, 142 U. S. 547) brings the defendant's case not only within the letter but within the spirit of the constitutional guarantee. The practical effect of holding that the defense of former conviction cannot be relied upon where the judgment upon it has been reversed on error is to hold that the provision in the Constitution is wholly superfluous. For if a defendant in a criminal case has been acquitted he is protected by the plea of *res adjudicata*, which applies to criminal as well as civil cases (*Scott* v. *U. S.*, Morris 142; *The State*

v. *Mikesell*, 70 Ia. 176.) If convicted of a non-capital crime if he serves his sentence he is protected by the plea of former punishment (*Ex parte Large*, 18 Wall. 163), and if he is relieved from the sentence by a pardon he pleads his pardon. Therefore, by the application of the well known rule of construction that no part of the Constitution will be held to be superfluous (*Hurbado* v *California*, 110 U. S. 516), it follows that the only state of facts to which the double jeopardy prohibition can apply is a state of facts like that at bar.

Consequently the double jeopardy provision must prevent a second trial of any person who has been convicted of a capital crime on a valid indictment before a properly organized court of the United States having jurisdiction in any case where the judgment is reversed on error.

(d) Rule three of this Court requires it to follow the former practice of the Court of King's Bench, and as that rule was not altered or modified since its adoption, either by the court or act of Congress, as to capital crimes, it was without power to award a trial de novo on the former writ of error.

Rule 3 of this court was adopted on August 8, 1791 (1 Cranch XVI). A rule of the court is the law of the court. It has the force and effect of law and must be complied with. (15 C. J., and cases cited; *Rio Grande Irr. Co.* v. *Gilderslieve*, 174 U. S. 603.) It is binding on the court as well

as on the parties. In *Rio Grande Irr. Co.* v. *Gilderslieve, supra,* it is said:

> "A duly authorized rule of court has the force of law, and is binding upon the court as well as upon parties to an action and cannot be dispensed with to suit the circumstances of any particular case. * * *
>
> The rule once made * * * must be applied to all cases which come within it until it is repealed by the authority which made it."

Herein, therefore, the court was bound by its own rule. It could not grant nor direct the lower court to grant a new trial. Neither could defendant by suing out a writ of error confer jurisdiction on the lower court to do that which by the law and practice governing both courts they were prohibited from doing. According to the practice of the Court of King's Bench a new trial could not be awarded in capital cases either directly or by direction to the lower court.

Lord Kenyon, in *R.* v. *Mawbey,* 6 T. R. 638, presiding in the Court of King's Bench, in the year 1796, said that in capital cases "No new trial can be granted at all." All the works of practice announce the same rule. "A new trial cannot be granted in a case of felony, *even by the Court of Queen's Bench.*" (Archbold Cr. Pr. & Pl. 177 1 Chit. Cr. Law (Eng. Ed., p. 654; 2 Russ Cr., bk. 6, c. l. sec. 1 (2 Lord Ed.), p. 589; 2 Tidd Pr., p. 820.)

The Act of February 6, 1889, c. 113, Sec. 6, providing for review by this Court in capital cases contemplated that the judgment of the lower court

should be "re-examined, reversed or affirmed" by this court on respondent's application. It also provided that when "reversed or affirmed" it should be remanded, so that the lower court should give effect to the judgment of "affirmance or reversal." That statute did not contemplate a departure from the practice of the Court of King's Bench in capital cases on the question of new trials. It reiterated and gave effect to the rule of the common law that on error the court had jurisdiction only to affirm or reverse. (*Ballew* v. *U. S.*, 160 U. S. 187.)

It and other statutes may have modified the rule of the common law to the extent of authorizing the remand of the case to the lower court for the sole purpose of ordering the discharge of the prisoner, but not for the purpose of awarding a new trial. At common law a reversal of a judgment in a criminal case by the Court of King's Bench the prisoner was entitled to his discharge. (*The King* v. *Ellis*, 5 Barn & Cross 395; *The King* v. *Borne*, 7 Ad. & Ellis 58; *Ex parte Frederich*, 149 U. S. 70; *Walsh* v. *Com.*, 224 Mass. 39; *Ex parte Page*, 49 Mo. 291.)

Shepherd v. *People*, 25 N. Y. 406.
Lowenberg v. *People*, 27 N. Y. 336.
Hartung v. *People*, 26 N. Y. 167.
Elliott v. *People*, 13 Mich. 365.

Upon remand of the case defendant was entitled to judicial proceedings thereon according to the course of the common law. For the purpose of this case defendant was an inhabitant of Kansas. The territory of Missouri organized by the

Act of Congress, June 4, 1812, included the state of Kansas (2 Stat. 743, c. 95; *Davis* v. *McColl,* 179 M. A. 198.) The fourteenth section of said Act provided that "the people of the said territory shall always be entitled * * * to judicial proceedings according to the common law." This was equivalent to the provision of Article 2 of the Ordinance of 1787 organizing the Northwest territory, which provided that "the inhabitants of the said territory shall always be entitled to * * * judicial proceedings according to the course of the common law." The Amendments to the Constitution are declaratory of the rights contained in the Declaration of Rights adopted October 14, 1774, which contained the following provisions:

> "That the inhabitants of the English Colonies in North America, by the immutable laws of nature, the principles of the English Constitution, and the several charters or compacts, have the following rights:
>
> * * * * *
>
> That our ancestors, who first settled these colonies, were at the time of their immigration from the mother country, entitled to all the rights, liberties and immunities of free and natural born subjects within the realm of England. * * * That by such immigration they by no means forfeited, surrendered or lost any of those rights, but they were, and their descendants now are, entitled to the exercise and enjoyment of all such of them as their local and other circumstances enable them to exercise and enjoy.
>
> * * * * *
>
> That the respective colonies are entitled to the common law of England, and more espe-

cially to the great and estimable privilege of being tried by their peers of the vicinage according to the course of that law.

That they are entitled to the benefit of such of the English statutes as existed at the time of their colonization, and which they have by experience respectively found to be applicable to their several local and other circumstances.

That these, his majesty's colonies, are likewise entitled to all the privileges and immunities granted and confirmed to them by royal charters, or secured by their several codes of provincial laws."

The foregoing demonstrates that the rights of the defendant under the Constitution were those rights which were accorded an accused by the common law at the time of the adoption of the Constitution. (*Traction Co.* v. *Hoff*, 174 U. S. 1; *Lane* v. *Kansas*, 163 U. S. 81.) Furthermore, by virtue of the Seventh Amendment, no fact tried by a jury shall otherwise be re-examined in any court of the United States than according to the rules of the common law. (*Traction Co.* v. *Hoff*, 174 U. S., p. 1; *Ex parte Lang*, 18 U. S. 161.) How, then, could the District Court have jurisdiction to place defendant in second jeopardy of his life?

II.

The former verdict disposed of two issues in the case: first, guilty as charged; second, acquittal of the species of charge warranting capital punishment. The former writ of error to this court was prosecuted from the judgment on the phase of the verdict finding defendant guilty of the crime. Therefore the verdict acquitting the defendant of the species warranting the infliction of the death penalty remains in full force and effect.

At the former trial of this cause the jury rendered the following verdict:

> "We, the jury in the above entitled case, duly impaneled and sworn, upon our oaths, do find the defendant, Robert F. Stroud, guilty as charged in the indictment, without capital punishment."

Upon that verdict the court rendered the following judgment:

> "Thereupon it is now here by the court considered, ordered and adjudged that said defendant, Robert F. Stroud, be imprisoned in the United States penitentiary at Leavenworth, Kansas, for the period of his natural life.
>
> It is further ordered that said defendant be remanded to the custody of the warden of said penitentiary, to be by him imprisoned and safely kept in accordance with the judgment and sentence herein."

This judgment and verdict were rendered on the 28th day of May, 1917, and thereafter, within due course, on the 25th day of August, 1917, defendant filed a petition for a writ of error, alleging error in the judgment and proceedings prior thereunto. At the same time defendant filed an assignment of errors, which concluded with the prayer:

> "Wherefore, the said Robert F. Stroud prays that the judgment aforesaid may be reversed, annulled and altogether held for nothing, and that he may be restored to all things he has lost by said judgment and sentence."

On *motion of the Government* a new trial was granted by the trial court after reversal and that court, without setting aside the verdict, made the following order:

> "It is further ordered that the former judgment of this court sentencing defendant to be imprisoned in the United States penitentiary at Leavenworth, Kansas, for the period of his natural life is hereby vacated, set aside and held for naught, and a new trial of this cause is ordered to be had."

A new trial cannot be had on the motion of the Government (*U. S.* v. *Sanges,* 144 U. S. 310.)

So that on the entire record the former verdict is in full force and effect.

This Court has held that its proceedings on reversal of a judgment "are governed entirely by the Acts of Congress, the common law and the ancient English statutes." (*Camp* v. *Gress,* 39 Sup. Ct. Rep. 478.) By the common law and an-

cient English statutes upon reversal of a judgment in a criminal case it could only order the discharge of the prisoner. (*In re Frederich,* 149 N. S. 70, 74; *Rex* v. *Bourne, 7* Ad. & El. 58.) The Court, then, must look to some Act of Congress for its authority in disposing of a capital case coming to it from a Federal Court after reversal.

In *Ballew* v. *U. S.,* 160 U. S. 187, in discussing the power conferred on it by certain Acts of Congress in civil and non-capital cases, the Court said:

> "Under the power thus conferred it has never been questioned that this Court possessed authority upon reversal for error of a final judgment to award a new trial."

It recognized that the reversal of a judgment did not annul the verdict and that at least as to the character of case then before the Court it could after reversal either render a proper judgment on the verdict or direct the lower court to do so. In *Camp* v. *Gress,* 39 Sup. Ct. Rep. 478, it is said:

> "In cases coming from Federal Courts the Supreme Court is given by statute full power to enter such judgment or order as the nature of the appeal or writ of error requires."

While we contend that this Court is without authority to order a new trial in a capital case and that in that regard its Rule 3 requires it to follow the former practice of the Court of King's Bench in England and discharge the defendant on reversal of a judgment in such case and also con-

tend that a trial court of the United States is without power to grant a new trial in a capital case (*U. S.* v. *Gibert*, 25 Fed. Cas. 15204), yet if we concede for the sake of argument that this Court has power to set aside the verdict and grant a new trial itself or order the trial court to do so, yet *since it has done neither but simply reversed for further proceedings, and since the lower court has not set aside the verdict*, it follows that the verdict rendered on May 28, 1917, stands in full force and effect and deprived the lower court of power and jurisdiction to proceed with the last trial of the cause. This for the following additional reasons:

In *Ballew* v. *United States, supra,* and *Camp* v. *Gress, supra,* this Court has committed itself to the doctrine that a simple reversal of a judgment without more does *not affect the verdict on which the judgment rested.* The remand of the cause, therefore, unaccompanied by an opinion, to the District Court, merely gave that court power to take such action in the case as it could have taken had the trial term not passed. The further proceedings which could be had in the District Court on remand were merely to spread the mandate on its record and order the discharge of the prisoner. The District Court could not look to an opinion of this Court for guidance. Its jurisdiction was circumscribed and bounded by the law which prohibited it from granting a new trial after the passage of the trial term. (*U. S.* v. *Mayer*, 235 U. S. 55.) Even had the lower court the power after the passage of term at which it was rendered to set aside the verdict, yet

since it wholly omitted to do so the former verdict, undisturbed on the record, was an insuperable barrier of record to another trial of the defendant.

So long as the verdict was not directly held to be void, either by this or the lower court, it could not be held to be void merely by implication.

But even had the former verdict been set aside, yet as it acquitted defendant affirmatively of the heinous variety of the offense for which capital punishment could have been imposed the only issue which could have been retried was the question of guilty or not guilty. It cannot with any grain of reason be held that the defendant prosecuted a writ of error from the verdict "without capital punishment" for that was in his favor. The federal courts have repudiated the doctrine of inconsistency and repugnancy in verdicts. (*Walsh* v. *U. S.*, 174 Fed. 615; *Flickinger* v. *U. S.*, 150 Fed. 1; *Harvey* v. *U. S.*, 159 Fed. 419.)

There are decisions in which causes were reversed for further proceedings and new trials thereafter had, but in those cases the reversal was for proceedings in conformity with the opinion or in conformity with law and justice, and usually opinions were filed from which the trial court could discover or ascertain the nature of the proceedings indicated by the upper court, but the order here is of a wholly different variety, for the judgment is merely reversed and the cause remanded for further proceedings. In *Coughlin* v. *McElroy*, 74 Conn. 444, it is said:

> "The reversal of a judgment annuls, but does not necessarily set aside, the foundation on which it rests. This foundation may be sufficient to support a judgment of a different kind, and may be such as to require it. A reversal, therefore, is never, standing alone and *ex vi termini,* the grant of a new trial."

Clouser v. *State,* 72 Ia. 303, is a type of case where there was an opinion filed from which the court might gather that it was authorized to proceed with a new trial. It will be noted that the reversal does not include the proceedings had before the judgment. The assignment of errors did not ask for a reversal of the proceedings or verdict, but merely for a reversal of the judgment. All of the statutes prescribing the jurisdiction of this Court in cases over which Congress has given it appellate jurisdiction contemplate that this Court has jurisdiction upon reversal to remand the cause to the lower court, but that it must itself, if it contemplates that additional proceedings must be had, direct the lower court either by opinion or express direction as to what proceedings must be had. In *Ex parte Medway,* 23 Wall 504, an appeal was prosecuted from the Court of Claims to this Court and an opinion written on the facts. Upon reversing the judgment, it was remanded for further proceedings "in conformity with law and justice." It was held that the Court of Claims was authorized to grant a new trial. It must be noted, however, that this Court had in its opinion declared what law and justice was as applied to that case, so that the Court of Claims, upon reading the opinion,

necessarily knew what course to pursue. Furthermore, a proceeding in the Court of Claims is a proceeding under a special statute in which there is no jury trial and no common law right can be involved.

The action of this Court in reversing the judgment of the lower court and remanding the case for further proceedings without specifying what those proceedings were, and without any opinion to guide the lower court, was an action calculated to leave the lower court in the dark as to what proceedings this Court contemplated. The trial court could not determine whether or not this Court intended to rule, or did rule, that it was without jurisdiction of the cause or that all of the proceedings had, prior to the judgment, were erroneous, and consequently, in giving to the accused the benefit of every reasonable doubt upon the law as upon the facts, the trial court should have simply discharged the defendant and dismissed the indictment. On writ of error to this Court, the Court is not limited to the errors assigned in the assignment of errors in a capital case, but will notice any others that appear in the record. (215 U. S. 541.) And this is true in a civil case if apparent on the record. (176 U. S. 242.) The judgment herein recites that the cause came on to be heard on the transcript of the record from the District Court. As every intendment is to be made in favor of the accused in a capital case, and all questions of doubtful law and fact resolved in his favor, it was the duty of the trial court, since this Court failed to write an opinion, to resolve the question as to whether or

not this Court directed the further proceedings to mean merely a discharge of the defendant and a dismissal of the indictment in favor of the defendant.

This is a case in which the defendant was convicted of murder at the former trial, but manifestly it must be (at least impliedly) of a less degree than that to which the death penalty could be attached. This court in the case of *Winston* v. *United States,* 172 U. S. 303, has held that the qualification statute (Section 330 of the Penal Code) was enacted to meet the difficulty of laying down exact and satisfactory definitions of degrees of the crime of murder applicable to all possible circumstances. Said the court:

> "The difficulty of laying down exact and satisfactory definitions of degrees in the crime of murder, applicable to all possible circumstances, has led other Legislatures to prefer the more simple and flexible rule of conferring upon the jury, in every case of murder, the right of deciding whether it shall be punished by death or by imprisonment. This method has been followed by Congress in the Act of 1897."

Therefore, for the purposes of the present discussion, the defendant must be held to have been convicted of a lesser degree of murder in the first degree than that which would warrant the infliction of the death penalty. In other words, by the enactment of Section 330, the Congress created a degree of murder within the category known as statutory first degree and yet of a lesser degree

than the extreme first degree. The concrete question then before the court is, what effect is to be given to a conviction of a lesser degree of the crime charged in the indictment and express acquittal of the punishment on the greater degree in a case where the judgment upon the lesser degree was reversed on writ of error. As we have pointed out, the question is an open one in this Court. There are some cases in which it was held by state courts that upon reversal, where the verdict of the lower court was for the lesser degree, that the verdict of conviction of the lesser degree could not be relied upon as an acquittal of the greater degree upon the theory that a verdict was single and entire and merely stated the fact to be that the defendant was guilty of the lesser grade. In a logical sense, it may be that the reasoning of the few courts which so hold is defensible, but that reasoning does not apply in a court of the United States upon a first degree murder charge where *two* issues are presented and an express finding on both. Those issues are: First. Is the defendant guilty of murder in the first degree? Second. Will the jury attach to the verdict of guilty the words "without capital punishment"; in other words, find that the accused shall not be put to death? The very section authorizing the jury to qualify their verdict recognizes that the verdict finding the defendant guilty is something separate and distinct from the verdict "without capital punishment," for the statute says "the jury may qualify their verdict of guilty by *adding thereto* 'without capital punishment.'" It thus appears that the verdict re-

turned on May 28, 1917, was not single and entire, but that the jury found two issues submitted to it by the court. The defendant prosecuted a writ of error from the verdict which found him guilty. He could not be held to have prosecuted it from the verdict which acquitted him of the death penalty. In all of the cases in which it has been held that a conviction of the lesser grade of a crime was an acquittal of the greater, the acquittals were by implication only. The same may be said of those cases in which the courts reached conclusions to the contrary. This was true in the Trono case. But here we have a case in which the jury *expressly acquitted* the defendant of the greater degree of crime charged in the indictment. On this phase of the question, also, the case is new. We direct the Court's attention to the dissenting opinion in the Trono case and also to the multitude of cases cited in the margin of the dissenting opinion in support of the proposition that the verdict of May 28, 1917, amounted to an acquittal of the grade of murder to which the death penalty attached and that the Government could never again try the defendant for the higher grade of the crime of which he had been acquitted. The last clause of the sentence which constitutes Section 330 of the Penal Code seems to answer the question. It follows:

> "* * * whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment for life."

This is a statutory command in which the impersonal word, "whenever" is used advisedly. It was unnecessary for the trial court to re-try an issue that had been already determined and from the verdict upon which no writ of error was prosecuted. The court improperly, and without taking this into consideration, undertook to re-try the whole matter. The defendant did not ask for a new trial, either by way of motion to the lower court, or in his assignment of errors which was before this court. He in no way asserted that the verdict of the jury acquitting him of the grade of the crime to which the death penalty was attached and expressly finding that the punishment for the crime should not be capital was erroneous. It should be noted that the verdict of the jury did not find that the defendant should be imprisoned for life. Had it done so, or had the statute authorized such finding, and had the defendant prosecuted a writ of error, then there might be some excuse for holding that the verdict on that issue was affected by the reversal; but this is a case in which the statute authorized the jury to acquit of capital punishment and since it has affirmatively done so, it is impossible to conceive how the court can logically reason that the verdict on an issue from which no writ of error was prosecuted and which was for defendant's benefit and in his favor, can be held to be nullified because of the fact that a writ of error was prosecuted from the judgment on the verdict finding defendant guilty.

The decisions of the English courts and of nearly all the American courts hold that when a

defendant is acquitted either directly or by implication of the higher species of the crime charged in the indictment then the reversal of the conviction will be held not to authorize the retrial of the accused for that species of the crime of which he was acquitted.

In 25 Eliz., one Darley being appealed of murder, was found guilty of homicide, and had his clergy but afterwards an indictment was preferred against him for murder, as if his former conviction for homicide did not include the offense he was now charged with. But the court there held that the former conviction was a good bar to this indictment; they emphatically declared that it was a good bar at common law, and restrained by no statute; they said it was one fact and no man's life should be twice put in jeopardy for one and the same offense (Reeve's Hist. Eng. Law, Vol. 5, p. 460; 4 Rep. 40a).

> "—though a reversal is secured and a new trial ordered upon application of the accused, the prevailing rule is that, on the second trial, he cannot be tried for or convicted of a higher degree of the crime than that of which he was previously convicted."
>
> Wharton on Homicide 1049-1050, citing the English case of *Rex* v. *Jennings*, Russ. & R. C. C. 388 and cases from nearly all the State Courts.

III.

A District Court of the United States is empowered by Section 53 of the Judicial Code upon the application of a defendant in a criminal case to transfer the cause for trial to another division of the district and the denial of a defendant's application for such transfer is error fatal to the verdict in a case where it appears that because of prejudice against him on the part of the inhabitants of the division, in which the trial was had, defendant can not have a trial by an impartial jury such as the constitution contemplates.

The court erred in failing to transfer the cause from Division 1 of the District Court to some other division of the District of Kansas for the reason that on the facts set up in defendant's motion for a change of venue, it was the duty of the court to have ordered the cause transferred.

Section 53 of the Judicial Code provides that:

> "All prosecutions for crimes or offenses shall be had within the division of such districts where the same were committed *unless the court, or the judge thereof, upon the application of the defendant, shall order the cause to be transferred for prosecution to another division of the district.*"

The above named section also makes a provision for the transmission of all the papers in the case to the division to which the cause is transferred. It is manifest that this section contemplated that it was the *right* of a defendant to apply for such transfer and that in a proper case it was

the *duty of the court to order the transfer.* This statute should have been construed as are all laws enacted by Congress in the light of the common law (*Sanges* v. *U. S.*, 144 U. S. 310). At common law, when a fair and impartial trial could not be had in the county where the crime was committed and the indictment had been removed into the King's Bench by *certiorari*, that court could, upon application of the accused, change the venue to another county. (3 Blackstone, pages 294, 350.) In *Reg* v. *Barrett*, Ir. R. 4 Cl. 285, the opinion fully reviews the authorities and concludes that they "show that the jurisdiction to change the place of trial in cases of felony does exist." In *Rex* v. *Cowle*, 2 Burr, 834, 859, Lord Mansfield said:

> "The law is clear and uniform, as far back as it can be traced. * * * So, in parts of England itself where an impartial trial cannot be had in the proper county, it shall be tried in the next."

In *Crocker* v. *Justices*, Supra Ct. 208 Mass. 162, in discussing this question of the right of an accused to a change of venue from a county or locality in which he cannot have a fair and impartial trial says:

> "If the matter is considered on principle and apart from authority, the same conclusion is reached. It is inconceivable that the people who had inherited the deeply cherished and hardly won principles of English liberty and who depleted their resources in a long and bloody war to maintain their rights of

freemen, should have intended to deprive their courts of the power to secure to every citizen an impartial trial before an unprejudiced tribunal. A court of general jurisdiction ought not to be left powerless under the law to do within reason all that the conditions of society and human nature permit to provide an unprejudiced panel for a jury trial. Without such a power it might become impossible to do justice either to the general public or to the individual defendant. Our system of government has created the executive, the legislative and the judicial, as three independent and co-ordinate departments, and in strong and comprehensive language has prohibited each from attempting to exercise the functions of either of the others, 'to the end that it may be a government of laws and not of men.' The courts of general jurisdiction under such a Constitution have the inherent power to do whatever may be done under the general principles of jurisprudence to insure to the citizen, a fair trial, whenever his life, liberty, property or character is at stake. *The possession of such power involves its exercise as a duty whenever public or private interests require.*"

Section 53 of the Judicial Code providing that prosecutions shall be had within the division of the district where committed contains one exception and one only, to the general rule that such prosecutions must be in the division of the district where committed. That one exception is where the court or judge, upon defendant's application, shall order the cause transferred for prosecution to another division. Manifestly the fact that Con-

gress granted the power to the judge or court to make an exception to the general rule upon the defendant's application and that absent such application the power does not exist, discloses that it was the intention of Congress to place an obligation or a duty commensurate with the grant of power upon the judge or court. Endlich on the Interpretation of Statutes, Sec. 430, says:

> "When a power is conferred to do some act of a judicial nature, or of public concern and interest, there is implied an obligation to exercise it, when the occasion for it arises."

> "—whenever a power is given by a statute, everything necessary to the making it effectual, or requisite to attain the end, is implied. *Quando lex aliquid concedit, concedere videtur et id, per quod devenitur ad illud.*" (1 Kent's Com. 464 *Ex parte* Marmaduke, 91 Mo. l. c. 262.)

The only question then to be determined is whether or not the petition praying for the transfer of the cause filed by the defendant before the trial and denied by the court created an occasion for the exercise of the power. We respectfully submit that upon the facts in this record it was the duty of the court to order the transfer of the cause. The court actually found that there was a public prejudice and sentiment against the defendant so strong as to prevent a fair and impartial trial at Leavenworth, Kansas. This is shown by its order sustaining the motion to quash the panel in so far as jurors from Leavenworth county were concerned. Furthermore, the court

refused to hear evidence in support of the motion which was tendered and offered by the defendant before the trial. The court seemed to be of opinion that if jurors were obtained from counties of the First Division, other than Leavenworth, of the district that the local prejudice and sentiment against him was immaterial and could not become operative. In this the trial court was in error. In *State* v. *Flaherty*, 24 S. E. 885; 42 West Va. 240, the question here presented was directly involved. Said the court:

> "But we find error in the action of the court upon Flaherty's motion for a change of venue. The bill of exceptions on this matter certified that Flaherty filed a petition praying a change of venue on the ground that public sentiment against him was so strong that he could not get a fair trial in Cabell county, and offered evidence to show good cause for such change of venue, and the state resisted on the ground that an effort should be first made to obtain a jury; and *the court refused to hear evidence* at that time, and proceeded to get a jury, and obtained a sufficient number of jurors, and the prisoner was thus 'forced into trial,' in the language of the exception. If we should say that the verified petition is too general, in failing to specify facts showing that a fair trial could not be had, *it surely was a good basis for evidence to show such facts, and the prisoner offered to furnish such evidence, but the court refused to hear it;* concluding, from the fact that a jury passing the usual examination was obtained, that was conclusive evidence of the absence of prejudice and influence in the community endangering a fair

> trial. We do not share in that opinion. *That a jury is found free from exception personal to its members is not a final test.* Influences, silent yet potential, may permeate the community, endangering an impartial trial. Motions for change of venue are passed upon before the empaneling of the jury. Here the court shut the prisoner off from showing good cause for change of venue; taking the fact that 12 men were found competent jurors as the all-sufficient test on the motion for a change of venue, and discarding all other evidence. * * *
>
> Therefore, we reverse the judgment, set aside the verdict, grant a new trial, and remand for further proceedings."

If it be said that Section 53 of the Judicial Code vested a discretion in the court as to whether or not it would overrule or deny the application for transfer of the cause, yet this is a case in which the court did not exercise its discretion because it absolutely refused to hear the evidence. In *Kennon* v. *Gilmer*, 131 U. S. 22, the court said:

> "The granting or denial of a change of venue, like the granting or refusal of a new trial, is a matter within the discretion of the court, not *ordinarily reviewable* by this court on writ of error. *McFaul* v. *Ramsey*, 20 How. 523; *Kerr* v. *Clampitt*, 95 U. S. 188; *Railway Co.* v. *Heck*, 102 U. S. 120. And the refusal to grant a change of venue on the mere affidavit of the defendants' agent to the state of public opinion in the county clearly involves matter of fact and discretion and is not a ruling upon a mere question of law."

A somewhat similar statute of the Indian Territory was construed to be mandatory and to entitle the applicant upon a strict compliance with its provisions to the change as of right. (*Hendricks* v. *United States*, 219 U. S. 79.) In this case the court failed to exercise its discretion upon the presentation of the application because it capriciously refused to permit the introduction of the testimony which the defendant offered to produce in support of the application. In a case where the action of the trial court in refusing a new trial was alleged to be erroneous because of its refusal to permit the introduction of evidence in support of the motion, this Court said:

> "The allowance or refusal of a new trial rests in the sound discretion of the court to which the application is addressed and the result cannot be made the subject of review by writ of error. (*Henderson* v. *Moore*, 5 Cranch 11; *Newcomb* v. *Wood*, 97 U. S. 581.) But in the case at bar the District Court excluded the affidavits and in passing upon the motion did not exercise any discretion in respect to the matters therein stated. Due exception was taken, and the question of admissibility thereby preserved."
>
> *Mattox* v. *U. S.*, 146 U. S. 140.

Those authorities disclose that on the facts set up in the petition for transfer of the cause the court refused to exercise the discretion or the judicial duty cast upon it by Section 53 of the Judicial Code. The necessary result of the conduct of the court and the district attorney during the ab-

sence of defendant's counsel in May, 1918, was to prejudice the men who thereafter constituted the jury and to inflame and prejudice the jury and create a sentiment against the defendant in the breasts of the inhabitants of Leavenworth, Kansas, and the court officials and attaches by whom the jury was surrounded. The reflection upon the counsel by the court and the sworn affidavit of the district attorney to the effect that the defendant, through his attorneys, offered to plead guilty to one of the degrees of the crime of murder precluded the defendant from having other than the forms of a trial without the substance of the right. It follows that the verdict cannot stand. In *McDuff* v. *Detroit Journal Co.*, 22 Am. St. Rep. 673, the court said:

> "Appellate courts must presume that one occupying so important position as that of circuit judge can influence a jury. It is their duty to follow his instruction as to the law. Whenever he expresses an opinion on * * * the character of a witness or compliments one attorney at the expense of the other, or uses language which tends to bring an attorney into contempt before the jury, or uses any language which tends to prejudice them, he commits an error of law for which the verdict and judgment must be promptly set aside."

It appears from the record herein that Judge Lewis stated in the presence of the panel that if defendant's counsel were within the jurisdiction of the court he would have the marshal arrest them, and that he believed that their conduct was unprofessional in that they were attempting to dodge their professional responsibility to the defendant and to the court. It was impossible for said counsel thereafter to render any service to the defendant in presenting his defence to the jury because their minds were already steeled against him, so much so that they must necessarily have expressed regret at not being able to include the defendant's attorneys in the verdict of guilty, with capital punishment.

In *Executors of Lynch* v. *Norry*, 1 Bay (s. c.) 299, the court said:

> "No rule of law is better established than this, that where a fair trial cannot be had in one county or district, a venire must be awarded to an adjoining county. The books are full upon this point, and the principle of law is founded on wisdom and justice."

The court cannot lawfully determine the question by the statements of jurors that they are not prejudiced. This is not the question involved.

In *Western Coal & Mining Co.*, 75 Ark. 76, it is said:

> "To determine whether a change of venue should be granted merely upon statements from the jurors that they bore no prejudice against the defendant is equivalent to holding that if a qualified jury can be selected from the panel the change of venue must be denied. Manifestly, this is not the law. Jurors are as competent as other persons to testify to the non-existence of prejudicial sentiment in the county, but *the decision should not hinge upon*

> *whether these jurors are or are not themselves prejudiced;* and it would be better to get this evidence outside the jury box."

It follows that the court failed to accord to defendant his right to a fair and impartial trial by compelling him to go to trial in a locality which the court actually found to be so prejudiced against the defendant that none of its inhabitants could serve as jurors.

IV.

The district court deprived defendant of his right to a trial by an impartial jury of the state and district of Kansas, by refusing to quash the jury panel where it appeared that the district attorney, in attempting to force a trial during the absence of defendant's counsel, while they were unavoidably detained in the trial of a cause in an adjoining state before a court of general jurisdiction, made and caused his affidavit to be read in the hearing of the panel reciting his unwarranted conclusion that defendant's said counsel had deserted their client, the defendant, and that they had proposed to enter a plea of guilty, and where it appeared that the judge of said court during the unavoidable absence of defendant's counsel, denounced them in the presence and hearing of the panel as being guilty of professional misconduct, declaring that if they were within the jurisdiction of that district court, he would order them into custody of the marshal, thus and thereby depriving defendant of his constitutional right to be tried

for his life by an impartial jury of the state and district where the homicide was alleged to have been committed.

The considerations applicable to the refusal to transfer the cause to another division of the district apply here also. The motion to quash the panel and the exhibits showing the misconduct of the district attorney, the comments of the district judge and the newspaper comments on said conduct are shown on pages 38 to 55, inclusive, of the record. As a result of the wholly unwarranted conduct on the part of the court and prosecutor, when the case was called for trial on May 23, 1918, the trial before the jurors who were present amounted to the mere form and shadow of a trial without its substance. The wholly unwarranted statement that defendant's counsel proposed to have the defendant plead guilty and that they were seeking an opportunity to desert the defendant in his hour of greatest need, and the court's strictures thereupon necessarily convinced the jury that the defendant was guilty, and that he and his counsel were resorting to a trick to obstruct the administration of justice. The record shows that the court on June 24 (26) sought to correct the wrong by sustaining the motion to quash in so far as it applied to jurors from Leavenworth county. But the objections which were good as to jurors from Leavenworth county were also good as to jurors from every other county. The jurors actually impanelled all came from "the body of the First Division of the District of Kansas" (27), and of course were permeated with

the same poison as the members of the panel from a particular county of the division. The legal effect of sustaining the motion to quash as to those from Leavenworth county was equivalent to a finding that as a matter of fact the impartiality of the entire panel was destroyed. That finding was that the panel was not impartial. Furthermore, the court declined to hear evidence in support of the motion to quash. It could not, therefore, exercise its discretion, if any it had, as to its ruling on the motion, and it thus violated the rule that when the exercise of discretion depends upon the determination of an issue of fact a court commits error if it refuses to hear evidence in support of the issue. (*Mattox* v. *United States*, 146 U. S. 140.) Furthermore, when the question of the partiality of a jury is in issue the defendant is not concluded by the answers of the members of the panel on their *voir dire* examination. (*State* v. *Flaherty*, 42 W. Va. 240; *Western Coal & M. Co.*, 75 Ark. 76.)

Section 287 contemplated that the court would set down all challenges to the panel for trial, for it provides:

> "All challenges to the array or *panel* * * * shall be tried by the court without the aid of triers."

In this connection the Government did not even attempt, either by written pleading or on the *voir dire* examination, to answer the allegations of the motion to quash. Of course, these allegations could not have been denied, for the reason that

the record discloses that the members of the panel were sitting in the presence and hearing of the court and counsel on May 23, 1918, and that remarks were especially directed to them (49-50). Exhibit "E" (53-54) is a specimen newspaper article. It shows that Judge Lewis addressed the members of the panel and that he denounced defendant's absent counsel in his discourse to the jury after such fashion that even the newspaper reporters recognized what must have been patent to everyone, to-wit, that they could render no substantial service to defendant before the members of a jury panel in whose minds defendant and his counsel were already discredited. This is demonstrated in the article, "Stroud is shrewd enough to recognize by this time that these Kansas City lawyers are not the ones he now wants to look after his interests." (R. 54.)

Prejudicial remarks in presence of jury, though not impanelled, are erroneous (*Allen* v. *U. S.*, 115 Fed. 3) especially in absence of counsel. In that case the Court of Appeals for the Ninth Circuit, after citing numerous authorities holding that prejudicial remarks of the prosecutor and the court in the presence of the panel before the jury are empaneled, said:

> "The remarks of the United States attorney were calculated to cast reflection on defendant and his counsel, and the remarks of the court emphasized this reflection. * * * But it is said that the remarks were made before the jury was empaneled. This makes no difference. They were made in the presence of all the jurors. It matters not, there-

> fore, whether they were in the jury box or outside the railing of the court room. There is no pretense that the jurors did not hear the remarks. The chair or bench upon which they were seated does not control the question. The remarks of the court if erroneous, had the same effect as an erroneous instruction given to the jury regularly impaneled."

Suppose the court herein had in its charge to the jury stated: "That the defendant has offered to plead guilty and his counsel regard the defense of his case as so hopeless that they sought to avoid appearing in his defense and furthermore their conduct in connection with the defense is unprofessional and if I had the power I would order them into the custody of the Marshal." Such a charge would hardly be calculated to amount to a dispassionate statement of the law calculated to cause the jury to correctly decide the issues.

The examination of juror Finnegan supports the allegations of the motions to transfer and to quash. Part of it follows:

> "Q. Have you heard the purported facts in this case? A. No more than I heard in this court room (160).
>
> * * * * * * *
>
> Q. You said, Mr. Finnegan, you didn't know anything about this case except what you heard in this court room. When did you first hear it in this court room? A. It was here a month ago.
>
> Q. At that time you heard some statements made by Mr. Robertson about the case? A. Yes, sir.
>
> * * * * * * *

Q. Didn't you hear Mr. Robertson's statement about the case? A. Yes, sir.

Q. And you heard His Honor make some remarks in the case? A. Yes, sir.

Q. He made some remarks about the counsel in the case? A. He didn't have much counsel at that time.

Q. You heard the remarks, whatever they were? A. Yes, sir.

Q. Now, Mr. Finnegan, what you heard necessarily created some opinion in your mind about the guilt or innocence of the defendant? A. Well, the slightest bit, yes, sir.

Q. That is to say, after having heard what transpired about this case, you had an opinion that would require evidence to remove? A. Yes" (161).

The juror was then challenged by defendant for cause. The court thereupon examined the juror, concluding with:

"Q. And you have an opinion now as to his guilt or innocence? A. I guess I have an opinion.

The Court: Do you challenge him?

Mr. O'Donnell: Yes, we challenge him, Your Honor, for cause.

The Court: Let us see how many jurors we have here. *I am satisfied he is as qualified as any juror you will get.* * * * If it takes all summer we are going to try this case."

The examination of J. L. Randall contains the following:

"Q. Have you heard anything about this case? A. I read a short account of it in the

papers and heard what was talked here a month ago.

* * * * * * *

Q. Have you a feeling of prejudice against the administration of capital punishment? A. No, sir; but rather, from what I have read and heard about it, I am rather *in favor of capital punishment in this case.*

Q. Now, if you are chosen as a juror here, will you be controlled by what you have read and heard or what you get here in the court room? A. What I *got* in the court room.

Q. I take it from that remark that you have heard a little about it in the past? A. Yes, sir" (164).

These statements on the part of the jurors that from what they heard in the court room in May, 1918, and the newspaper descriptions as to the occurrence that they had opinions which it would require evidence to remove, and that they were in favor of capital punishment *in this case.* Yet the court found that such jurors were as well qualified as any that were selected, for it said, "I am *satisfied* he is as *qualified as any you will get,*" and was determined to try defendant with such jurors "even if it took all summer." This amounted to a finding by the court based upon the testimony of the jurors that they were prejudiced and their impartial qualities destroyed by reason of the matters and things set forth in the motions to transfer the cause and to quash the panels.

The truth of the allegations of the motion to quash stood admitted, and not only stood admitted but the court found as a fact that the matters and things alleged disqualified part of the panel. How,

then, can it be held that defendant was tried by a jury of the impartial variety required by the common law which has been incorporated into the Sixth Amendment? "* * * The founders of the English law have, with excellent forecast, contrived that no man should be called to answer to the king for any *capital* crime unless (upon accusation) * * * the truth of every accusation, whether preferred in the shape of indictment, information or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors, *indifferently chosen* and *superior to all suspicion.*" (Bl. Com., Bk. IV, 350.) Does it appear from this record that the "jurors were superior to all suspicion" of partiality? On the contrary, does it not affirmatively appear that the entire panel was permeated with that poison of prejudice against defendant and his counsel which the court found to exist in part? The cause for challenging the entire panel was grounded on a manifest presumption of partiality, that the court actually found to be true as to part of the panel. As it stood admitted on the record the court should have pronounced the judgment of the law and sustained the motion to quash as to all. By the Constitution of the United States (Amend. VI) the accused was entitled to a trial by an impartial jury. A juror to be impartial must, to use the language of Lord Coke, "be indifferent as he stands unsworn." Co. Litt. 115b. Lord Coke also says that a principal cause of challenge is "so called because, if it be found to be true, it standeth sufficient of itself, *without leaving anything to the discretion of the triers*" (id. 156b); or, as

stated in Bacon's Abridgment, "it is grounded on such a manifest presumption of partiality that, if found to be true, it unquestionably sets aside the * * * juror." Bac. Abr. lib. Juries, E. 1. "*If the truth of the matter alleged is admitted, the law pronounces the judgment;* but if denied, it must be made out by proof to the satisfaction of the court or the triers." (*Reynolds* v. *U. S.*, 98 U. S. 145.) As the truth of the matter alleged was admitted it is manifest that the jury lacked the essential requirement of the common law right of a person charged with a capital crime to a trial for his life by a jury "superior to all suspicion." (Bl. Com., Bk. IV, 350.) The constitutional provisions concerning jury trial "had in view the rules of the common law of England" (*Capital Traction Co.* v. *Hof*, 174 U. S. 1) and as one of the rules of that law required that the jury in a capital case be "superior to all suspicion," it follows that defendant's right to be tried by an impartial jury, safeguarded in the manner provided by the law, was violated and that in this instance the provisions in this regard of the Fifth and Sixth Amendments did not in the trial court secure his right to be tried by an impartial jury and not to be deprived of his life without due process of law. If it be held that the truth of the matter was not admitted, then the question was to be determined by the court upon evidence adduced as an ordinary issue of fact. If the alleged partiality be "denied, it must be made out by proof to the satisfaction of the court or the triers." (*Reynolds* v. *U. S.*, 98 U. S. 155.) But how made out if the court refuses to hear evidence? How was the fact as to

partiality to be determined, which it was "the duty of the court trying the case to decide" (*Curry* v. *The State*, 5 Neb. 412, l. c. 414) if that court would not hear the evidence? The court seemed in this regard to have forgotten that

> "It is essential that every juryman should be wholly free, even from the *suspicion of bias*, and be *omni exceptione majores*." *Dauncey* v. *Berkeley*, cited in 3 Chit. Gen. Prac. 795.

The court did not conform to the mandate of the law when it approved the effort of the prosecutor to inflame the passions of the jury against defendant during the absence of his counsel. It actively participated in stirring up their passions. It ignored the rule that

> "The law has so watchful an eye to the pure and unbiased administration of justice that it will never trust to the passions of mankind in the decision of any matter of right."
>
> (*Hesketh* v. *Braddock*, 3 Burr 1847.)

It forgot that the founders of the American law builded on the foundations laid by the founders of the English law and that every essential incident to the right of trial by jury at common law is preserved to men accused of crime in the courts of the United States. Says Blackstone (Vol. IV, p.—):

> "* * * The founders of the English law have, with excellent forecast, contrived that no man should be called to answer to the king for any capital crime, unless upon the preparatory accusation of twelve or more of his

fellow subjects, the grand jury; and that the truth of every accusation, whether preferred in the shape of indictment, information or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen *and superior to all suspicion*, so that the liberties of England cannot but subsist so long as this *palladium* remains sacred and inviolate; not only from all open attacks (which none will be so hardy as to make), *but also from all secret machinations, which may sap and undermine it.*"

V.

The court by refusing to sustain defendant's challenges for cause which were well founded, deprived the defendant of the right to the twenty challenges allowed by the statute and thereafter denied him the right to the thirty-five challenges allowed by the constitution in which the common law rule on this subject is incorporated.

The defendant was compelled to use two of his peremptory challenges to get rid of the jurors Williamson and Hill. He had challenged both of those jurors for cause and those challenges were overruled. The court allowed the defendant only twenty peremptory challenges and compelled him to exhaust these to excuse jurors who were manifestly incompetent to serve. This was manifestly prejudicial.

The law will presume prejudice in a case where the court refused to sustain defendant's challenge for cause and defendant was compelled to use

his peremptory challenges to exclude a juror properly challenged for cause where before the jury was sworn the peremptory challenges were exhausted. (*People* v. *Weil*, 40 Cal. 268; *Trenor* v. *Ry. Co.*, 50 Cal. 22; *Nubbard* v. *Rutledge*, 57 Miss. 7; *State* v. *Brown*, 15 Kan. 400.) This for the very plain reason that the act of the court in refusing to sustain a challenge for cause, and thereby compelling the defendant to use his peremptory challenge to exclude a juror, necessarily, by this conduct, denies to defendant that peremptory challenge which the law allows as his absolute right. (See *Bales* v. *State*, 13 Smed. & M. 398; *Williams* v. *State*, 32 Miss. 390; *Finn* v. *State*, 5 Ind. 400; *Van Blaricum* v. *People*, 16 Ill. 364.)

But the court undertook to limit the defendant to twenty peremptory challenges (208). The record shows that the judge's calculation was incorrect as to the amount of challenges actually allowed. Apparently the court was of opinion that Section 287 of the Judicial Code limited the number of peremptory challenges. That statute provides that "when the offense charged is treason or a capital offense the defendant shall be entitled to twenty and the United States to six peremptory challenges." That statute affirming that a defendant shall be entitled to twenty challenges does not expressly negative the common law right. This is one of the most important rights secured to the accused. "The end of challenge is to have an indifferent trial, and which is required by law; and to bar the party indicted of his lawful challenge is to bar him of a principal matter concerning his trial." (3 Inst. 27, c. 2.) He may, if he choose, peremptorily challenge "on his own dis-

like without showing any cause." He may exercise that right without reason or for no reason, arbitrarily and capriciously. (Co. Lit. 156b; 4 Bl. Com. 353; *Lewis* v. *U. S.*, 146 U. S. 376.)

In *Lewis* v. *United States*, 146 U. S. 376, it is said:

> "The right of challenge comes from the common law with the trial by jury itself, and it has always been held essential to the fairness of trial by jury As was said by Blackstone, and repeated by Mr. Justice Story: 'In criminal cases, or at least in *capital* ones, there is in *favorem vitae* allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all, which is called a peremptory challenge; a provision full of that tenderness and humanity to prisoners for which our English laws are justly famous. This is grounded upon two reasons: (1) As everyone must be sensible, what sudden impressions and unaccountable prejudices we are apt to conceive upon bare looks and gestures of another; and how necessary it is that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him. The law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for his dislike. (2) Because, upon challenges for cause shown, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning of his indifference may sometimes provoke a resentment; to prevent all ill consequences from which the prisoner is still at liberty, if he pleases peremptorily to set him aside.'"

This Court, when discussing the question of challenge, was discussing the right of peremptory challenge. That right, says the court, "comes from the common law with the trial by jury itself." That right of challenge as it existed at common law is an incident, concomitant and ingredient of the right secured by the Section 2, Article 3, of the Constitution, providing that "the trial of all crimes except in cases of impeachment shall be by jury." But *a fortiori* is it an essential part of the right secured by the Sixth Amendment, guaranteeing an "impartial jury." This for the reason given by this Court that "it has always been held *essential to the fairness* of trial by jury" (*U. S.* v. *Lewis, supra*). That is to say, in a constitutional sense the right to an impartial jury is not accorded to a defendant who is denied an opportunity to make his peremptory challenges to the full limit allowed by the common law. Says Blackstone (Bk. IV, p. 354):

> "The peremptory challenges of the prisoner must, however, have some reasonable boundary; otherwise he might never be tried. This *reasonable boundary is settled by the common law to be the number of thirty-five;* that is, one under the number of three full juries."

The reasonable number of men which constitute a jury was settled by the common law at twelve, and because the common law so fixed the number of the jury this Court has held that the words "jury" and "trial by jury" necessarily import a jury of twelve men. (*Thompson* v. *Utah*,

170 U. S. 343.) By the same token the phrase providing that "the accused shall enjoy the right to a speedy and public trial by an *impartial* jury" necessarily means that the number of peremptory challenges which the common law deemed essential to the impartiality of the jury (or as this Court puts it, "essential to the fairness of trial by jury") is the number secured by the constitutional guarantee.

If Congress could whittle the number down to twenty, could it not also cut the number down to one or take away altogether the right of peremptory challenge? And if it could take away the right of peremptory challenge, could it not also abolish the right of challenge for cause? And if it did this, would it not necessarily destroy the only means by which an "impartial" jury could be secured? That is to say, destroy the right altogether. It follows that defendant was entitled to his thirty-five challenges accorded him by the common law and at least to the twenty provided by the Act of Congress.

The attitude assumed by the court during the *voir dire* examination of the jurors prevented the selection of an impartial jury on the question of the measure of punishment to be imposed in the event of a finding of guilty of murder in the first degree.

The impatience manifested by the court in the presence of the panel when defendant challenged a juror (whose examination disclosed that he had an opinion that it would require evidence to remove and that that opinion was based upon the conduct of the court and district attorney in the

presence of the panel on May 23, 1918), by the bitter statement that "I am satisfied he—as qualified as any juror you will get * * * if it takes all summer we are going to try this case." taken in connection with the idea conveyed to the jurors by other remarks of the court that a juror would be properly qualified only if he favored capital punishment, prevented the impaneling of a jury who were impartial on the question of qualification of their verdict.

Chester Moore's examination disclosed that he was opposed to capital punishment as a policy or rule of law, though he "never felt that the death penalty a good many times was severe enough" (R. 82). He did not know what his verdict might be (81), but he would follow the instructions of the court (83). Excused on challenge of the Government over defendant's exception (83).

John A. Basgall did not know that he was opposed to capital punishment to the extent that he would not vote for it under proper circumstances (93). Did not believe in capital punishment as a question of policy (94). Would prefer life imprisonment to the death penalty (94). Did not know whether he had conscientious scruples against capital punishment (94). The court thereupon in the presence of the other members of the panel undertook to examine the juror and then ordered him to stand aside (95). The whole examination of Basgall disclosed that the court would not permit a juror to sit on the panel unless he preferred capital punishment to life imprisonment.

Moherman:

> "I would be governed according to the evidence. It would have to be pretty strong for me to be in favor of the death penalty, if I did * * * I have not decided that; I would have to have the evidence in order to say" (102-103).

On the Government's challenge the court ordered this juror to stand aside, over defendant's exception, notwithstanding his answers as a whole disclosed that he would be governed by the evidence and that all reasonable doubt as to the propriety of the death sentence would have to be removed from his mind by the evidence before he would vote to inflict it.

The court refused to permit an inquiry concerning the attitude of juror Lowry toward the law of Kansas abolishing the death penalty. This was directed to the very qualification required by Section 275 of the Judicial Code (115).

The court refused to sustain defendant's challenge to juror Williamson notwithstanding his testimony demonstrated that he would never vote for a less penalty than death in a first degree murder case (143-152-153). The defendant was compelled to exhaust one of his peremptory challenges to get rid of this juror (153). The examination of the juror Hill also demonstrated that defendant's challenge for cause as to him should have been sustained (195-198).

A careful reading of the record shows that the court held the view that men were not qualified to serve as jurors in a case of first degree murder

who hesitated to choose the death penalty rather than life imprisonment.

The jurors could not help feeling the force, influence and tendency of the court's ruling towards that viewpoint. The tendency of the court's attitude was to lead the jury to feel that to vote for a verdict which would result in capital punishment was the only proper course in a first degree murder case. Consequently the jurors were not impartial on the issue of the question of punishment, and defendant's rights in that regard were violated under the authority of *Manuel* v. *United States*, 254 Fed. 272.

VI.

It is error in a first degree murder case in a court of the United States to sustain the challenge of the government to a juror qualified under the law of the state in which the court sits to be a juror in a first degree murder case for the reasons (a) that section 275 requires that the qualifications of jurors in the State Courts shall determine their qualifications in the United States Courts, and (b) by virtue of section 330, of the penal code, the command of the law as to the measure of punishment for such crime is fulfilled by a verdict of guilty with the words "without capital punishment" added thereto.

The action of the court in refusing to permit veniremen to serve as jurors who had conscientious scruples against capital punishment violated both the letter and spirit of Section 275 of the judicial

code which prescribes the qualifications of jurors. Said Section 275 is as follows:

> "Jurors to serve in the courts of the United States, in each State respectively, shall have the same qualifications, * * * and be entitled to the same exemptions, as jurors of the highest court of law in such state may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned."

Construing this statute in *St. Clair* v. *U. S.*, 154 U. S. 147, this court said:

> "In respect to the qualifications and exemptions of jurors to serve in the courts of the United States, the state laws are controlling."

The grade of crime charged against the defendant in the indictment herein under Section 273 of the Penal Code is defined in language similar to that by which first degree murder is defined in Section 3367, General Statutes of Kansas, 1915. Section 273 of the Penal Code contains the following definition of first degree murder:

> "Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery (or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed); is murder in the first degree."

Section 3367, General Statutes of Kansas, 1915, defines first degree murder as follows:

> "Every murder which shall be committed by means of poison or by lying in wait, or by any kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration of an attempt to perpetrate any arson, rape, robbery, burglary, or other felony, shall be deemed murder in the first degree."

Section 3369 of the said Kansas Statutes provides as follows:

> "Persons convicted of murder in the first degree shall be punished by confinement and hard labor in the penitentiary of the state of Kansas for life."

The charge in the indictment could be as appropriately brought under the Kansas Statute as under the United States Statute in so far as the essential elements of the crime are involved. The punishment provided by the United States statutes is somewhat different. Section 275 of the Penal Code provides that:

> "—every person guilty of murder in the first degree shall suffer death."

Section 330 of the Penal Code is as follows:

> "In all cases where the accused is found guilty of the crime of murder in the first degree, or rape, the jury may qualify their ver-

> dict by adding thereto 'without capital punishment'; and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment for life."

Under the foregoing statutes, if the trial of the indictment were had in a District Court of the State of Kansas the veniremen challenged by the Government and excluded from the jury box by the court *on the ground that they had conscientious scruples against capital punishment* were qualified under the laws of the State of Kansas to sit as jurors in the highest court of law in that state having jurisdiction to try the charge. Does it not necessarily follow that they were also qualified to sit on the trial of the defendant under the express provisions of Section 275 of the Judicial Code? Again the action of the court in overruling the defendant's challenge to those veniremen who disclosed on their *voir dire* that if they were sworn as jurors they would never in any case of first degree murder, vote for or be in favor of imprisonment for life was necessarily erroneous. Those men thereby demonstrated that they were not qualified to sit as jurors under the laws of the State of Kansas and were anarchists at war with the government of the state in which they live, and consequently were expressly disqualified by Section 275 of the Judicial Code. The ruling of the court was a ruling directly contrary to the provisions of Section 275, of the Judicial Code and consequently in conflict with the provisions of the Sixth Amendment guaranteeing to defendant a

trial by an impartial jury of the state and district of Kansas. The jury was not an impartial jury in the constitutional sense because its qualifications were not determined by the test or standard provided by the laws of the United States and of the State of Kansas.

Furthermore, the government was not entitled to have a jury which would assess the death penalty in any event. This for the reason that Section 330 of the Penal Code authorized the jury to qualify their verdict by adding thereto the words "without capital punishment," and in so doing should have been left free and untrammeled to qualify their verdict for any reason that seemed good to them whether it was a conscientious objection to the infliction of capital punishment or no. *Winston* v. *U. S.*, 172 U. S. 303. The court in that case citing some cases having to do with kindred statutes, said:

> "While those decisions have no direct bearing upon the question now in judgment, they are important as illustrating the steadfastness with which the full and free exercise by the jury of powers newly conferred upon them by statute in this matter have been upheld and guarded by this court as *against the possible effect of any restriction or omission in the rulings* and instructions of the judge presiding at the trial."

The very point has been determined in *State* v. *Lee*, 91 Ia. 499, where it is said:

> "A juror of the regular panel, while being examined as to his qualifications to act as a

juror in this case, stated that he had conscientious scruples against the infliction of the death penalty and that he could not conscientiously agree to a verdict which should fix that penalty. Thereupon, the State challenged the juror for cause and the challenge was sustained. Two other jurors gave similar answers, and were excused for cause on the challenge of the State. In this we think there was error. * * * It cannot be said that the State is entitled to have the punishment by death inflicted in any case. The statute authorizes that punishment, in the discretion of the jury, when a person is convicted of murder in the first degree; but the State has no right to a trial by jurors who have no objection against inflicting the death penalty, except as it can secure them by challenging peremptorily those who have such objections."

In *State* v. *Garrington*, 11 S. D. 178, it is said:

"Comp. Laws, Sec. 644, provides that persons convicted of murder shall suffer death or imprisonment for life, at the discretion of the jury. Section 7359, provides that, if the punishment be death a challenge for implied bias may be made to jurors who entertain conscientious opinions against capital punishment. At the time of the enactment of Section 7359, the death penalty was the only punishment for murder. Held, that while a juror may no longer be challenged for holding opinions against capital punishment, yet he may be asked as to the holding of such opinions as a basis for a peremptory challenge."

In *Borowitz* v. *State*, 75 So. l. c. 763, Ethridge, J., said:

> "Under the former law no juror who had any conscientious scruples against the infliction of the death penalty could sit on the jury at all unless he perjured himself. If he agreed to guilt and was unwilling to return a verdict he stood as a self confessed perjurer not only before the twelve jurors who had taken the same oath that he had taken, but before all men who should come to know of his refusal to abide by his oath. The real purpose of adopting the amendment, as shown by the history of the statute, was to make competent as jurors that great and growing body of men who stood for law and order and peace and right, but who shrank from the responsibility of taking that which God only could give. These men could not serve on juries in capital cases because on their consciences they feel like they could not assume responsibility for taking from man that which could not be number amongst the best citizenship of the state and in some communities this conscientious sentiment was so strong and formidable as to make it difficult to enforce the law in murder cases."

Citing:

> *State* v. *Garrington*, 11 S. D. 178; *State* v. *Lee*, 91 Ia. 499; *State* v. *Dooley*, 89 Ia. 584; *People* v. *Dooley*, 7 Cal. 140, and *Atkins* v. *State*, 16 Ark. 568.

Judge Etheridge proceeded:

> "In our state we have no statute providing that conscientious scruples against the in-

> fliction of the death punishment is a disqualification, but the disqualification for this cause, heretofore recognized, grew out of the fact that the verdict of guilty in a murder case would be followed by death unless the whole jury fixed the punishment at less than death. It is a principle as old as English common law that where the reason of a rule ceases the rule itself ceases, and there is under the present statute no reason why a juror should not return a verdict of guilt even though he entertains scruples against the death penalty. The state representing the whole people of Mississippi does not clamor for any man's life, but is satisfied in case of guilt with a life sentence for the prisoner."

Conscientious scruples against capital punishment is not a ground for challenge by the state where the jury are given the option to substitute imprisonment for the death penalty. (*State* v. *Lee*, 91 Ia. 499; *State* v. *Garrington*, 11 S. D. 178.) But a juror may be examined as to his scruples as a basis for peremptory challenge. (*Hardy* v. *U. S.*, 186 U. S. 228; *State* v. *Dooley*, 89 Ia. 584.)

In *Winston* v. *United States*, 172 U. S. 1. c. 310, this court has in effect ruled that the statute authorizing the jury to qualify their verdict was enacted to make those citizens who were opposed to capital punishment competent to serve as jurors. That is to say, in one sense, Sec. 330 of the Penal Code in first degree murder cases is a statute which *prescribes a qualification* for jurors. Said the court:

> "The hardship of punishing with death every crime coming within the definition of

> murder at common law, and the reluctance of jurors to concur in a capital conviction, have induced American legislatures in modern times to allow some cases of murder to be punished by imprisonment instead of by death."

That the statute was a qualification statute is further shown from the fact that this court has held that it commits the whole matter to the "consciences" of the jury. The Government and the District Court seemed to think that the only sort of conscience which a juror in a first degree murder case in the Federal Court should possess is a seared and withered conscience which would warrant the possessor thereof in arrogating to himself the right to write an exception into the commandment "thou shalt not kill." Of course the Government is always entitled to a jury having no conscientious scruples against the infliction of the death penalty whenever upon a finding of guilt the law attaches that penalty to the guilt. But in a case where the right to take human life does not depend upon the application of a hard and fast rule of law, but upon the "conscience" of the average man, it necessarily follows that the Government is not entitled to men not of the average class from the mass, but men with consciences of a bloodthirsty variety. In the last cited case the court further says:

> "The right to qualify a verdict of guilty by adding the words 'without capital punishment' is thus conferred upon the jury in all cases of murder. The Act does not itself pre-

> scribe, nor authorize the court to prescribe, any rule defining or circumscribing the exercise of this right, but commits the whole matter of its exercise to the judgment and the *consciences* of the jury. The authority of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the court *or the jury* is of opinion that there are palliating or mitigating circumstances. But it extends to every case in which upon a view of the whole evidence the jury is of opinion that it would not be just or wise to impose capital punishment."

The action of the court in excluding from the jury box these men who stood for law and order and peace and right in the state of Kansas, but who shrank from the responsibility of taking that which God only could give because on their "consciences" they felt that they could not assume the responsibility for taking that from man which could not be returned to him in case of mistake, was based upon a construction of Section 330 of the Penal Code, which failed to take into consideration the real purpose of Congress in enacting it. The defendant was entitled to have men serve as jurors who numbered among the best citizenship of Kansas, where the conscientious sentiment against capital punishment was so strong and prominent that the Legislature of that state wrote into its statutes Jehovah's commandment, "thou shalt not kill" for any cause. The action of the court in permitting men to stay on the jury who swore that in a first degree murder case they would not impose the penalty for life imprisonment under any circumstances, but would insist on

death, were men who were out of harmony with their fellow citizens in the state of Kansas and opposed to the laws of that state and incompetent to sit in a murder case in that state because their sworn testimony on the *voir dire* demonstrated that they would not vote in any first degree murder case for the penalty authorized by the laws of the state of Kansas, but for a different and discarded penalty. They also swore on the *voir dire* that they would not in any case vote for the infliction of the milder form of the penalty authorized by Section 330 of the Penal Code of the United States, consequently they were out of harmony on this question with the sentiment and the laws of the citizens of the United States as expressed in said Section 330. Even upon the theory of the Government that it was entitled to jurors who would vote for the extreme penalty, the accused was entitled to jurors who, while not conscientiously opposed to the infliction of the death penalty, were also not conscientiously opposed to the infliction of the milder penalty. There can be no escape from the conclusion that if the Government was entitled to a tribunal conscientiously capable of punishing the defendant with death, then the defendant was entitled to a tribunal conscientiously capable of inflicting the milder form of punishment. This was a matter of vital consideration to the defendant; his life hung in the balance. But the court ruled upon the question as though his life was a matter of small importance to the defendant.

But the Government insisted at the trial, and doubtless will here insist, that on the question of

punishment for first degree murder the law of the United States is in conflict with the law of Kansas, and that for said reason the law of the nation on this question must override the law of Kansas and authorize the Federal Courts to write an exception into Section 275 of the Penal Code to the effect that whenever there is a conflict between the measure of punishment which may be inflicted under the laws of the nation and the state for a crime, then that Section 275 does not control the Federal Courts and that the question of qualification is not to be determined by the federal statute or state statute, but by the discretion of the court. But that Congress did not intend to leave this important question to the discretion of the court is shown by Section 722 of the Revised Statutes. That section is as follows:

> "The *jurisdiction in* civil and *criminal matters* conferred on the District and Circuit Courts by the provisions of this Title, and of Title 'Civil Rights' and of Title 'Crimes,' for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but *in all cases* where they are not adapted to the object, or are *deficient in the provisions necessary to furnish suitable remedies and punish offenses against law,* the common law, as modified and changed by the constitution *and statutes of the state wherein the court having jurisdiction of such* civil *or criminal cause is held,* so far as the same is not inconsistent with the Constitution and laws of the United States, *shall be extended*

to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, *in the infliction of punishment on the party found guilty.*"

In *U. S.* v. *Mitchell,* 136 Fed., l. c. 909, it is said of this statute: "* * * There can be no question as to its general application."

This statute regulates the jurisdiction of the District Courts in criminal matters and says that that jurisdiction shall be exercised and enforced in conformity with the laws of the United States *only so far as such laws are suitable to carry the jurisdiction of the court in criminal cases into effect.* That jurisdiction cannot be exercised in accordance with the laws of the United States *unless such laws are suitable to carry the jurisdiction conferred in criminal cases into effect.* It follows that if Congress had not pointed out some other test than the laws of the United States for exercising the jurisdiction in criminal cases, then the jurisdiction could not be exercised. The Congress, however, expressly provided in said statute that "in all cases" where the laws of the United States are not adapted to the object or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, then the laws of the state so far as not inconsistent with the Constitution and laws of the United States shall be extended to and govern the District Courts in the trial and disposition of the cause. If it be said that Section 275 is deficient in the provisions necessary for the qualification of jurors in first degree murder cases so as to enable the

Federal Court sitting in Kansas to procure a jury which would inflict the death penalty, then Section 722 expressly authorizes the District Court to exercise its jurisdiction by following the statutes of Kansas according to which the qualifications of jurors are determined in first degree murder cases. Section 722 expressly says that the statute of Kansas shall be extended to and govern the District Court of the United States in the trial of first degree murder cases or any other offense punishable by the statutes of the United States, and then, lest there be any doubt upon the question, Section 722 expressly provides that if the cause on trial is of a criminal nature the District Court shall be governed by the local statute *"in the infliction of punishment on the party found guilty."* In legal contemplation the statutes of the United States are deficient in the provisions necessary to enable it to secure a jury qualified to punish the offense of first degree murder with death when the cause is being tried by a United States court in the district of Kansas. But the statutes of the United States are not deficient in provisions necessary to enable it to secure a jury qualified to punish the offense of first degree murder with life imprisonment when the cause is being tried by a United States court in the district of Kansas. There is no inconsistency between the laws of Kansas and the laws of the United States on the question of the qualifications of jurors in any criminal case, for Section 275 of the Penal Code expressly says that they are one and the same. There is no inconsistency between the laws of Kansas and the law of the United States in the

measure of punishment that may be inflicted in first degree murder cases. The laws of Kansas authorize imprisonment for life. The laws of the United States authorize imprisonment for life. The fact that under certain circumstances in the United States court the death penalty may be inflicted under the United States laws does not render said laws inconsistent with the laws of Kansas. The law of the United States authorizing life imprisonment declares that that degree of punishment is lawful and satisfies the law of the United States whenever the conscience of the jury recommends it. The law of the United States enables it to secure a jury in the state of Kansas whose conscience will authorize it to punish the offense with life imprisonment. It can make no difference to the Government how the juror's conscience may be created. The consciences of men have always been generated and governed (so long as they are law-abiding) by law, and whether that law be the law of man or the law of God the result is the same. The law of Kansas, in legal contemplation, regulates the consciences of the jurors of Kansas, consequently the citizens of Kansas who are called to render service as jurors in first degree murder cases, both in the courts of Kansas and the United States, must be considered to be in harmony with the laws of Kansas, and in so far as the conscience of a Kansas juror is contrary to the provisions of the laws of Kansas and opposed to the penal sanctions attached to penal offenses, he is a potential law violator, or an anarchist. It follows that the ruling of the court at the trial in excluding men who have conscientious scruples against the inflic-

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tion of the death penalty from the jury box as well as excluding men who would never vote for life imprisonment in first degree murder cases, resulted in filling the jury box with men who were, within the purview of the law of Kansas and Section 275 of the Judicial Code, mere outlaws and anarchists. If Section 330 of the Penal Code does not itself prescribe nor authorize the court to prescribe any rule defining or circumscribing the exercise of the right to add the words "without capital punishment" in all cases of first degree murder, as this Court has held in the Winston case, it is difficult to see how the trial court was justified in holding that a conscientious objection to the infliction of capital punishment on the part of a juror limited and circumscribed and prevented a juror from voting to add those words to a verdict of guilty. If the Act, as the court said in the Winston case, commits the whole matter of the exercise of that right to the *conscience* of the jury, how could the court lawfully hold that a jury should be selected from whose consciences the commandment "thou shalt not kill" had been excluded. The Government was entitled to a jury whose combined or collective conscience would represent the conscience of the state of Kansas as shown in the laws of that state, and not the conscience of the people of New York or other states where the death penalty is inflicted for first degree murder. It follows that upon reason and authority the court committed error in excluding the jurors who had conscientious scruples against the death penalty and in refusing to exclude the

jurors who had conscientious scruples against the infliction of life imprisonment.

Commenting upon the decision in *State* v. *Ellis,* 120 N. E. 218, the editor of Vol. 87, No. 16, page 274, Central Law Journal, said:

> "In *State* v. *Ellis,* 120 N. E. 218, decided by Ohio Supreme Court, it was held on appeal by the state that it was error for the trial court to allow a juror to be asked by defendant's counsel whether in a case of first degree murder he would be willing to consider, in the event of a verdict of guilty of that degree, any recommendation to mercy. Such recommendation having the effect under the statute of sentence to life imprisonment, when without it the punishment would be death.
>
> The court after saying that such a question has nothing to do with the qualifications of a juror to try a case impartially speaks of the *voir dire* examination as showing that in such a case he would not recommend mercy. 'It will not do to say that he would not consider the recommendation, because the very fact that he rejected such a recommendation presupposes consideration. Upon what theory of disqualification, then, of jurors would such answers disqualify the venireman? It is a well settled rule, under the statutes, where the jury have nothing whatever to do with the penalty attendant upon their execution of a verdict of guilty that prejudice against crime does not disqualify the jury.'
>
> But is this fair argument? It is well settled that a juror may be excused if he is opposed to capital punishment. This is a principle in favor of the prosecution. But when it is endeavored by the defense to procure a juror who will give to every question involv-

ing the degree of punishment fair consideration, the court holds that it is no ground for discharge of the juror, that he will not consider a recommendation within his discretion to make. It does not seem to be fair reasoning by the court to declare he will consider it, because he rejects that shows, says the court, that he considers.

But does he fairly consider recommendation? Who will say that with his mind made up to reject that he really does consider?

It seems to us that a jury composed wholly of such men is not such an one as defendant was entitled to have in the trial of his case. It is to deny him all consideration of facts which might appeal to them in fixing his punishment."

VII.

The court erred in proceeding with the trial for the reason that it affirmatively appears from the record that a list of the jurors was not served on the defendant two entire days before the trial began, or at all, and the rule for securing an impartial jury prescribed by the Statutes of William (7 Wm. III. c. 3), and Anne (7 Ann. c. 21), and incorporated in the sixth Amendment and categorically adopted by Section 1033 Rev. Stats. was violated.

The record affirmatively discloses that the methods which the law deems essential to the securing of an impartial jury were not followed, and that therefore the right of the defendant to a trial by an impartial jury were violated. It appears that *after the trial began* on June 25 the court ordered

a venire issued for ten additional jurymen to be summoned by the marshal from outside of Leavenworth county (R. 199). Two of those ten were selected to try the cause. The record does not show a waiver of the right on the part of defendant to receive a copy of the jury list at "least two entire days before the trial." This was his right under Section 1033, Rev. Stats.

The provision of the Sixth Amendment requiring that the accused shall enjoy the right to be informed of the nature and cause of the accusation necessarily means that the accused shall be so informed in the *manner provided by law.* Section 1033, Rev. Stats., provides that:

> "When any person is indicted of treason, a copy of the indictment and a list of the jury, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each juror and witness, shall be delivered to him at least three entire days before he is tried for the same. When any person is indicted of any other capital offense, such copy of the indictment and a list of the jurors and witnesses shall be delivered to him at least two entire days before the trial."

This Court has held that the trial begins with the impanelling of the jury. (*Hopt* v. *Utah,* 110 U. S. 478; *Lewis* v. *U. S.,* 146 U. S. 478.) The Sixth Amendment providing that the accused shall enjoy the right to a trial by an impartial jury is nothing more or less than an extension of the principles of the Statutes of William and Anne (7 Wm. III., c. 3) (7 Ann., c. 21) securing the

rights of subjects accused of high treason to "all criminal prosecutions."

The Statute of Anne provided that

> "all persons indicted for high treason or misprison thereof shall have not only a copy of the indictment, but a list of the witnesses to be produced and *of the jurors impaneled*, with their professions and place of abode, delivered to him ten days before the trial, and in the presence of two witnesses, the better to prepare him to make his challenges and defense." (4 Bl. 352.)

The Statute of William on the subject required delivery of a copy of the indictment "with a list of the freeholders from among whom the jury was to be taken." (4 Macauley's Hist. Eng., Chap. 18; 3 Hallam Const. of Eng. 160.) Under the old law prior to the enactment of those statutes a jury was selected *exactly as the last two were selected in the case at bar.* The *one method* which the Commons of England in its long struggle from the time the bill for regulating trials on charges of high treason *deemed essential to the securing of an impartial jury* was the delivery of the jury list to the accused a certain number of days before the trial. It was the *only provision* by which the defect in the old law in this respect was remedied. Necessarily the framers of the Constitution in incorporating the provisions of those English statutes in the Sixth Amendment contemplated that the one safeguard for the selection of an impartial jury which the English

Parliament soon after the revolution of 1688 found essential to the safety of Englishmen should be preserved in all its vigor in the amendment. This Court is committed to the doctrine that the essential incidents of the right to trial by jury and to a trial by an "impartial" jury which grew to be regarded as the essentials and incidents of English freedom are secured by the Constitution. (*Thompson* v. *Utah*, 170 U. S. 343.) As one of the incidents of trial by jury at common law was that its number should be twelve, and as the guarantee of trial by "jury" in the Constitution has been held to mean with us a trial by twelve as in England, so the incorporation of a provision securing the right to an "impartial" jury in the Constitution necessarily incorporates the right to the method for securing an impartial jury which was finally adopted after years of struggle by England's most liberty-loving generation. (2 Watson Const. 1485-1489.) The history of the times demonstrates the importance with which that generation regarded this method. (4 Macauley Hist. Eng., Chap 18.) The considerations concerning the meaning of the words securing the right to be informed of the nature and cause of the accusation to have process for witnesses and counsel for his defense apply here. The accused before the Statutes of William and Anne always had the right to have the indictment specify the alleged violation of the law with the same particularity as after their enactment. He also had a right to hear the indictment read to the jury. But until those statutes were enacted he could not get a copy of the indictment. This

was the right secured to a defendant by the clause requiring that he be informed of the nature and cause of the accusation.

Section 1033, Rev. Stats., is therefore merely declaratory of the constitutional guaranty in that regard and, of course, this is true of that part of it requiring delivery of the jury list "two entire days before the trial." The Statute of William is identical with Section 1033, Rev. Stat., concerning the delivery of the jury list two days before the trial. (3 Hallam Const. Hist. 160.) The purpose of delivering the indictment was to enable him "to prepare his challenges and defense." (4 Bl. 352.) So that Section 1033, Rev. Stat., concerning the delivery of a list of the jurors two days before the trial, is merely a legislative command supplementing that of the Constitution if the ordinary rules of construction be pursued. (See *Heydon's Case*, 3 Rep. 7b, p. 19.)

The third article of the Constitution, providing for a jury trial of "all crimes except in cases of impeachment," implied a trial in that mode according to the settled rules of the common law, but the people did not think they were sufficiently secured in that right by that provision, so they adopted the Sixth Amendment, bodily incorporating the Statutes of William and Anne into our fundamental law for the sole purpose of controlling the method by constitutional rules in which the right to jury trial in criminal prosecutions should be accorded. The right was already secured by the Third Article and, of course, the right to a trial by a jury as impartial as the old method of selection could afford. The Sixth

Amendment, therefore, merely prescribed the method by which the right already secured should be enjoyed. In *Callan* v. *Wilson*, 127 U. S. 540, l. c. 549, the court, discussing the amendment, said:

> "We do not think that the amendment was intended to supplant that part of the third article which relates to trial by jury. There is no necessary conflict between them. * * * As the guaranty of a jury trial in the third article implied a trial in that mode and according to the settled rules of the common law, the enumeration in the Sixth Amendment of the rights of the accused in criminal prosecutions is to be taken as a declaration of what those rules were, and is to be referred to the anxiety of the people of the states to have in the supreme law of the land, and so far as the agencies of the government were concerned a full and distinct recognition of those rules, as involving the fundamental rights of life, liberty and property."

The record affirmatively shows that this essential requirement was not observed. The court wrote an exception into the Constitution and the statute and procured the presence of the last two jurymen in exactly the same way as juries were obtained before the Statute of William. The Constitution and statute were wholly ignored. The Sixth Amendment and Section 1033, Rev. Stat., were regarded as non-existent. In this as in many other respects during the trial the life of the defendant seemed to be merely a matter of small consideration, while the convenience of the

court and prosecutor was the one matter of moment.

That talesmen may be called in cases other than capital does not justify ignoring the plain mandate of the *Constitution* and the *statute* in a capital case. This Court in *Lewis* v. *United States*, 146 U. S. 370, and *Hopt* v. *Utah*, 110 U. S. 478, discussing the effect of a *statutory* provision concerning defendant's presence while the challenges to the jury are being tried or made, said:

> "That which the law makes essential in proceedings involving life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods."

The record here does not show a specific objection, but neither does it show a waiver. A waiver strictly so called is the intentional relinquishment of a known right. (*Rice* v. *Fidelity Co.*, 103 Fed. 427.) "It is a recognized principle that everyone may waive a right intended for his own benefit if it can be relinquished without detriment to the community at large." (*Reid* v. *Field*, 83 Va. 26.) The law deems the receipt of the jury list by defendant at least two days before the trial, so that defendant can prepare his challenges, as essential as that he shall be present when the challenges are being tried or made. His presence when they are being tried or made is no more necessary to his safety in contemplation of the law than that the list of those being chal-

lenged shall be delivered to him in time to enable him to prepare his challenges.

Under the old law before the days of William and Anne the accused enjoyed the right to be present while his challenges were being made and tried. It was because that right did not enable him to secure an impartial jury that the statutes aforesaid were adopted after one of the greatest of all parliamentary struggles. (Watson on the Constitution, Vol. 2, 1485-1489; Macauley's Hist., Vol. IV.) The defendant could not therefore waive by mere silence that which the law deemed essential for his protection. For "the public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law." (*Lewis* v. *United States,* 146 U. S. 370.)

VIII.

Because of the failure of the indictment to categorically specify the degree of murder charged in the language of the statute, defendant's rights, under the Sixth Amendment, guaranteeing that he be informed of the nature and cause of all accusations, were violated.

The indictment shows that the defendant was prosecuted for a violation of Section 273 of the Penal Code. Said section defines murder. The first sentence is as follows: "Murder is the unlawful killing of a human being with malice aforethought." It defines murder in the first degree so far as applicable to this case, as follows: "Every murder perpetrated by poison, lying in

wait, or any other kind of wilful, deliberate, malicious and premeditated killing * * * is *murder in the first degree.*" The section defines murder in the second degree thus: "Any other murder is murder *in the second degree.*" The indictment herein fails to charge that the defendant was guilty of murder in the first degree. It should have used the statutory language so as to advise the accused of the exact extent and nature of the crime wherewith he was charged. The Sixth Amendment provides that:

> "In all criminal prosecutions the accused shall enjoy the right * * *to be informed of the nature and cause of the accusation."

The nature and cause of the accusation set forth in the indictment herein is that mentioned in the generic or first sentence of Section 273 defining murder. As to whether or not the crime was murder in the first or second degree was a question of fact and not of law. Since it was a question of fact and one which the jury was required to find in its verdict, it necessarily follows that it was a constituent element of the crime, and that in order to warrant the punishment of death that it should have been charged in the indictment. It was a statutory phrase essential in the description of the offense charged if the Government sought the punishment of death and consequently the accused was not advised with that particularity which the law requires of the nature and cause of the accusation. The failure

to describe the offense as murder *in the first degree* in the language of the statute deprived the court of jurisdiction and the jury of power to find the defendant guilty of the first degree of murder, and consequently there is no basis on which the judgment of death can rest. In Section 618, Bishop's New Criminal Procedure, Vol. 1, it is said:

> "Statutory words essential in the description of the offense cannot be omitted."

(See also *Rex* v. *Palmer*, 1 Leach 102; *Com.* v. *Simons*, 11 Gray 306; *Com.* v. *Peas*, 2 Grat. 629.)

The statute created no new murder. Bishop's New Crim. Law, Vol. II, Section 726, discussing identical statutes dividing the crime of murder into degrees, says:

> "It requires no interpretation to discern what is plain in the terms of these statutes, that they do not change the bounds of the offense of murder or make anything murder which was not such before. They simply draw a partition through the old field and give new names to the new parts, that is, on one side of the line it is murder in the first degree, and on the other it is murder in the second degree."

From this it follows that the indictment herein states facts warranting conviction for the same old murder, that is to say, murder in either degree. But in any event the degree of murder of which the defendant was found guilty should have been specified in the indictment. Section 330

contemplates that this be done, for the verdict must specify the degree. The words "in all cases where the accused is found guilty of murder *in the first degree*" necessarily contemplate that the jury should write into their verdict the degree of the crime of murder of which they found the defendant guilty. The words "in the first degree" in the verdict mean nothing if they do not mean that the jury found as a *fact* that it was first degree murder. If it was the duty of the jury to find as a *fact* that it was murder in the first degree, then it was the duty of the pleader to state that *fact* in the indictment which the jury were required to find as a condition precedent to a death sentence. The absolute certainty necessary in proceedings involving the life of a human being is wanting.

The statutes of Kansas govern the practice in this regard in so far as the duty of the jury is involved. Section 6818, General Statutes of Kansas 1909, is as follows:

> "Upon the trial of any indictment or information for any offense, where by law there may be a conviction of different degrees of such offense, the jury, if they convict the defendant, shall specify in their verdict of what degree of the offense they find the defendant guilty."

It has been held by the Supreme Court of Kansas that the finding of guilty with the addition of the words "as charged and set forth in the information" is insufficient to show that the jury intended to find the defendant guilty of every ele-

ment of the principal crime charged in the information. (59 K. 596; 24 K. 642; 20 K. 311; 16 K. 80, 475; 15 K. 302; 60 K. 560.) All of the states in which degrees of murder are recognized by statute have provided for such a finding by the jury for the reason that the law-making authorities of those states concluded that such finding was necessary to show that the jury intended to find the defendant guilty of the crime of which they found him guilty, whether it was the principal crime charged in the indictment or not. (59 K. 596.) When the Congress in the 1909 revision divided the crime of murder into degrees they omitted to enact a law requiring that the jury find the particular degree. Consequently this is a case where the statutes of the United States are deficient in a matter connected with the remedy The statute of Kansas above quoted is not inconsistent with the law of the United States, and consequently by Section 722 of the Revised Statutes it was commanded that this statute of Kansas should be extended to and govern the United States Court in the District of Kansas in the trial and disposition of the cause and *in the infliction of punishment.* It follows that the indictment was insufficient to give the court jurisdiction to sentence the defendant to death. The statutes of the United States make no provision authorizing the jury to find a defendant guilty of murder in the second degree. In the event that the jury found the defendant guilty of murder in the second degree, the only statutory authority by virtue of which it could specify the second degree of murder is the statute of Kansas adopted as it has

been by Section 722. The same reasoning which would make the specification of the second degree of murder appropriate and necessary results in making the specification of the first degree in the verdict appropriate and necessary.

In Vol. II, Bishop's New Crim. Procedure, Section 591, it is said:

> "The proper form for the verdict, in true propriety, is that the defendant is guilty, etc., 'in the first degree'; or guilty, etc., 'in the second degree'; or 'not guilty.' Concerning such a verdict, no question can arise."

Section 592:

> "When the finding is simply guilty, not specifying the degree, and the court receives and records this irregular verdict (as it should not do unless persisted in after due explanations), there are diverse opinions as to its effect."

Section 595:

> "That the verdict is imperfect and void, when silent as to the degree, is the doctrine of the great majority of the authorities, and probably the most in harmony with the reason of the thing, namely, that the Legislature intended this provision to be mandatory to make sure of the jury's taking into their special consideration the distinguishing features of the degrees, and passing thereon. Therefore, if the verdict fails to state on its face the degree, the court cannot give judg ment on it, but must award a second trial."

If Section 273 did create two separate offenses, then it necessarily follows that the indictment is faulty in failing to charge that the defendant was guilty of murder in the first degree in the language of the statute, or the verdict contains a surplus finding concerning the degree. If the pleader need not indicate the degree, then, manifestly, the jury need not have indicated the degree, so that upon either horn of the dilemma the judgment must be held to be invalid.

Section 273 did not create three distinct offenses. The first sentence defined the crime of murder. That is the only crime defined by the section. Of that single offense, two varieties are named in the statute. The charge that a murder was perpetrated by poison or by lying in wait or by any other kind of wilful, malicious or premeditated killing would support a finding of guilty of murder in *either degree*. A charge of the unlawful killing of a human being with malice aforethought would support a verdict for the variety of the offense denominated in the first sentence of the section. But as the first degree is included in the variety of murder mentioned in the first sentence a similar charge in the indictment would sustain a finding of guilty of murder in the first degree. Either of those charges would sustain a finding of guilty of murder in the second degree. It necessarily follows that the pleader should have specified the degree of the offence, in the language of the statute.

Section 1035 of the Revised Statutes does not apply to or permit a jury to find a verdict for murder in the second degree upon the theory that

such a crime is included in the charge of murder in the first degree. This for the reason that said section applies to a case where a distinct and separate offense is included in the charge on trial. It follows from this that the court was without jurisdiction and the jury without power to try the defendant upon a charge of murder in the second degree, unless it be conceded to be the same offense charged in the indictment as first degree. From this it follows that since the indictment charged murder in the second degree as distinctly as it charged murder in the first degree, and as both of those degrees come within the generic definition contained in the first sentence, then the indictment was fatally defective in failing to state the species in the descriptive words of the statute of the generic crime defined in the first sentence of the section.

In *U. S.* v. *Cruikshank,* 92 U. S. 557, it is said:

> It is an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law or by statute, "includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species—it must descend to particulars."

So here the indictment should have stated the species of murder and descended to the particular language of the statute in stating that particular fact descriptive of the crime which the law required the jury to write into their verdict before capital punishment could be imposed. It was

said by Story, J., in 3 Sumn. 12, 26 Fed. Cas. 380, that

> "No allegation whether it be necessary or unnecessary, whether it be more or less particular, which is descriptive of that which is legally essential to the charge in the indictment, can ever be rejected as surplusage."

It follows that the court below could not have imposed a sentence for first degree murder on the defendant.

IX.

The court erred in that in its charge to the jury it limited the jury in its consideration of the issue of self defense to the testimony of DEFENDANT'S WITNESSES ALONE and prevented the jury from considering all the facts and circumstances in the case on that issue as detailed in the evidence of the witnesses for the government.

The court, after stating to the jury that "it appears in evidence in this case on the part of some of defendant's witnesses that the deceased Turner drew his club on the defendant; that the defendant grabbed it once or twice and struggled over it, and that thereupon did raise it as if to strike the defendant, and that while the club was in the air the deceased struck the fatal blow." (R. 474.) The court then advised the jury that if "that testimony is accepted by you as being the true facts on that occasion" and that because of same Stroud believed and had reasonable cause to believe that he was being threatened with immediate personal

injury, then he had a right to strike in self defense. Then the court said:

> "But the question for your determination on that plea and that principle of law is whether you will accept the testimony of the *defendant's witnesses* as disclosing the true facts at that time."

This in effect advised the jury to disregard the evidence of the witnesses for the Government on this same point. Defendant's exception for that reason was pointedly directed to the omission of the court to include the testimony of the Government's witnesses which corroborated defendant's evidence on the point, the exception even going to the extent of naming the witnesses. The court's observation, "I have looked over the testimony of Whitlach," but accentuated the error and completely destroyed the value of all evidence in defendant's favor on that issue.

Defendant's witnesses were, of course, convicts whose direct examination disclosed their status and condition.

On cross-examination of each of those witnesses, after having elicited the nature of the crimes for which they were convicted, the district attorney stated:

> "You are one of a comparatively small coterie in the prison who are in rebellion against the officers, aren't you, the discipline of the prison?" (388, 397.)

This was a baseless insinuation and was followed up by questions wholly collateral and having

no force to test the veracity of the witness, but simply to enable the prosecutor to generate the idea by innuendo that the prisoners were in rebellion and to generate prejudice against defendant (398-402, 409-414, 419-424, 431-432).

The questions asked by the prosecutor and the suggestions made by him assumed facts not in evidence, and during his examination of the witnesses, with the approval of the court, dwelt on imaginary matters which were wholly irrelevant and collateral and did not have any tendency to test the credibility of the defendant's witnesses. The whole purpose of the questions and suggestions manifestly was to inflame the jury with the idea that defendant's witnesses were rebels. This vice permeated every question on cross-examination. Of course, the violence of their tempers or their conduct in collateral matters while in prison could not have any tendency to affect their credibility. When it was shown that defendant's witnesses were convicts and for what they were incarcerated, they were shown to be disgraced as deeply as it was possible for men to be disgraced. The questions, suggestions and baseless insinuations of the prosecutor therefore did not tend to lower the witnesses in the minds of the jury, but by innuendo tended to defendant's prejudice in the eyes of the jury.

Greenleaf on Evidence, Sec. 458, says that questions are incompetent,

> "the answers to which though they may disgrace the witness in other respects, yet will not affect the credit due to his testimony.
>
> * * * * * *

> Inquiries, therefore having no tendency to this end, are clearly impertinent. Such are the questions frequently attempted to be put to the principal female witness, in trials for seduction per *quod servitum amisit,* and an indictment for rape, etc., whether she had not previously been criminal with other men, or with some particular person, which are generally suppressed. So, on an indictment of a female prisoner, for stealing from the person, in a house, the prosecutor cannot be asked, whether at that house anything improper passed between him and the prisoner."

See *Dodd* v. *Morris,* 3 Campt. 579; *R.* v. *Hodgson, Russ & Ry.,* 211; *Vaughn* v. *Perrine,* 2 Penningh, 534.

It was to the testimony of witnesses thus stigmatized, over defendant's objection, that the court limited the jury in considering the issue of self defense. The court then directed the jury in determining whether they would believe this testimony given by each witness for defendant, "his past record if it has appeared in this case as an upright law abiding citizen" (477).

But the court by this charge wholly deprived the jury of the right to consider the testimony of the Government's witnesses on that issue, including that of Pollard, Whitlach and Beck.

Beck and Whitlach testified at the former trial that they had seen the struggle for the club (403, 407). At the last trial Whitlach denied having seen the struggle (281, 282, 283).

He does admit that Stroud and the guard talked while he traveled toward them a distance of twenty feet before he noticed any difficulty (281). He said that his answers at the former trial were not true (284). Both Whitlach and Beck, at former trials and other witnesses for the Government at the last trial, testified that they had seen the struggle for the club. Boyer, a guard, saw the blow struck that killed Turner, *but did not thereafter see the struggle* for the club though he watched Turner until he fell (265-266). From this it follows that the guard *drew his club and that Stroud grabbed for it before he struck the deceased.* This fact was excluded from the consideration of the jury on the issue of self-defense.

Pollard, a pardoned convict, and a witness for the Government, testified to an angry altercation between the defendant and Turner, and a struggle for the club before the tragedy occurred, and that Stroud was the more angry of the two (209-310-311). It was the angry voices that attracted his attention (315). This testimony was also excluded by the charge to the jury. The whole attitude of the court towards the defendant and his witnesses and counsel is reminiscent of the days when "the judges had sometimes not been ashamed to point out to the jury, in derogation of the credit of those whom a prisoner called in his behalf, that they were not speaking under the same sanction as those for the crown." (3 Hallam Const. Hist. 162.)

> "Accused is not limited to his own testimony of defensive matter, but is entitled to

the benefit of any defense presented by the evidence regardless of the source thereof."

(16 C. J. 775.)
Keith v. *State*, 50 Tex. Cr. 63.

Twice in the course of the charge to the jury the court stated that the testimony for the determination of the jury on the plea of self defense and the principle of law applicable to that defense was whether or not they would "accept the testimony of the *defendant's witnesses*, as disclosing the true facts at that time." To this charge an exception was taken to the effect that the court should not have excluded the testimony of witnesses for the Government, on the issue of self defense. The court in doing so, denied to the defendant the right to have the jury consider any testimony given on behalf of the Government which tended to exonerate him. This was manifestly erroneous. In *Bird* v. *United States*, 180 U. S. 356, the court charged the jury that if the killing "was not in the necessary defense of defendant's life or to prevent the infliction upon him of great bodily harm, then it is your duty to find the defendant guilty as charged in the indictment." Defendant excepted on the ground that the charge should have been further qualified by the further charge that if the defendant believed and had reason to believe that the killing was necessary for the defense of his life or to prevent the infliction upon him of great bodily harm, then he was not guilty."

Said the court:

"It is well settled that the defendant has a right to a full statement of the law from the court, and that a neglect to give such full statement, when the jury consequently fall into error, is sufficient for reversal. The numerous decisions to this effect are cited in Wharton on Criminal Law, Vol. 3, Sec. 3162, 7th Ed. The chief object contemplated in the charge of the judge is to explain the law of the case, to point out the essentials to be proved on the one side and the other, and to bring into view the *relations of the particular evidence adduced to the particular issues involved.* * * * —by the instruction given the jury were left to pass upon the vital question involved without reference to defendant's evidence."

X.

The trial court erred in denying the defendant's petition for the return of the letters written and deposited by defendant with officers of the Government for transmission through the mails, and in thereafter admitting said letters in evidence over defendant's objections for the reason (1) that this court on the former writ of error by its judgment on the Government's confession of error reversing the cause, held that the failure to grant a similar petition and the admission of said letters in evidence was reversible error, and (2) the admitted facts disclosed that said letters had been unlawfully seized and confiscated by the Government, acting through its warden in violation of its own constitution.

(1) The trial court erred in refusing to order the return and in admitting in evidence, over the ob-

jection and exception of the defendant, the letters deposited by Stroud with officers of the Government for transmission through the mails, because "the law of the case" had been declared by this Court.

In *Headley* v. *Challiss*, 15 Kans. 602, the late Mr. Justice Brewer, in determining what effect would be given to a former decision on appeal after a second appeal to the Supreme Court, said:

> "This case has been once before this court (*Challiss* v. *Headley*, 9 Kans. 684.) Upon abundant authority and well settled principles the decision at that time has become the established law of the case. *Phelan* v. *City of San Francisco*, 20 Cal. 40; *Polack* v. *McGrath*, 38 Cal. 666; *Yates* v. *Smith*, 40 Cal. 662; *McKinley* v. *Tuttle*, 42 Cal. 570; *Washington Br. Co.* v. *Stewart*, 3 How. 413; *Booth* v. *Commonwealth*, 7 Metcalf 286; *Hosack's Ex'rs* v. *Rogers*, 25 Wend. 313; *Mason* v. *Mason*, 5 Bush. (Ky.) 187. Whatever, therefore, was at that time decided is not now a matter for re-examination. *Nor is this limited to the mere questions noticed in the opinion nor indeed to the actual matters presented by the representative counsel, and considered by the court. It extends to all matters actually existing in the record and necessarily involved in the decision.* Thus in the case of 3 Howard, cited above, a question was raised as to the jurisdiction of the court, but as the case had once before been taken to the court and a decision rendered upon the merits, the question of the jurisdiction was held to be also settled, although as a matter of fact it had not been considered. And this, because jurisdiction is involved and assumed in an inquiry into and a decision upon the merits."

The question that presents itself is, what was decided upon the former writ of error? Manifestly something was decided, and the decision upon that something is the law of the case. According to the decision in *Headley* v. *Challiss*, it is not limited to mere questions presented by counsel or actually considered by the court. It extends to all matters actually existing in the record and necessarily involved in the decision. In 26 Ency. of Law 192-193, it is said:

> "The presumption is that all the facts in the case bearing on the points decided have received due consideration whether all or none of them are mentioned in the opinion."

In *Lase* v. *Clark*, 20 Cal. (approved by the U. S. Circuit Court of Appeals for the Eighth Circuit, in the *Balch* v. *Haas*, 73 Fed. 974), it is said, per Field, Ch. J.:

> "When the decision operates as a judgment, it is final upon the rights of the parties, *whether rendered upon full consideration or otherwise, and whatever be the character of the question passed upon.*"

See *Davidson* v. *Dallas*, 15 Cal. 75, for excellent opinion citing decisions from this Court. (*Re Potts*, 166 U. S. 263-268; *Stewart* v. *Salmon*, 97 U. S. 361; *The Lady Pike*, 96 U. S. 461; *Re Sanford T. & T. Co.*, 160 U. S. 247; *Wayne Co.* v. *Kinncott*, 94 U. S. 499; *Skillern* v. *May*, 6 Cranch 267; 1st App., 4 Cranch 137; *Gains* v. *Rugg*, 148

U. S. 228; 34 L. R. A. 321.) In *Phelan* v. *San Francisco*, 20 Cal. 39, l. c. 45, Chief Justice Field said:

> "A previous ruling by the appellate court upon a point distinctly made may be only authority in other cases, to be followed and affirmed, or to be modified or overruled according to its intrinsic merits, but in the case in which it is made it is more than authority; it is a final adjudication, from the consequences of which the court cannot depart, nor the parties relieve themselves. (See *Davidson* v. *Dallas*, 15 Cal. 75.)"

Upon the theory that the suing out of a writ of error is the commencement of a new suit and not a continuation of the suit below to which it relates (*Fitzpatrick* v. *Graham*, 119 Fed. 353; *Sharon* v. *Hill*, 26 Fed. 337) it follows that the consequences incident to the disposition of a new suit are incident to the disposition of the cause upon a writ of error. The assignment of errors is in the nature and in the place of a declaration setting forth the cause of action of the plaintiff in error (2 Tidd's Pr. 1168; 3 Steph. Com. 644; 2 Burr. Pr. 147; Armstrong App., 68 Pa. 409; *State Bank* v. *Goodell*, 10 Ark. 123) to which the defendant in error may plead. (3 C. J. 304.) It would seem to follow that the confession of error was as broad as the assignment of error since there was no limit to the confession. A judgment by confession is a judgment deciding that the well pleaded facts are adjudicated and cannot be further litigated. The Government is in the position of contending either that no decision was rendered

upon the reversal, or that some decision was rendered. Of course, there was a decision and the question is, what was it? The rule applicable in ordinary civil actions where a court renders judgment upon confession would seem to warrant the conclusion that the confession is as broad as the assignment and the judgment of reversal as broad as both. (*Masterson* v. *Howard,* 18 Wall. 99; *Railway Co.* v. *Trust Co.,* 133 U. S. 83.) On the theory, therefore, that the court decided the questions raised in the third and fourth assignments of error when the cause was here before, it necessarily follows that the trial court should have given effect to the judgment and mandate of this Court and have ordered the return of or excluded the said letters when offered in evidence upon the defendant's objection.

(2) *The decision of the District Court denying defendant's petition for the return of his letters after it had taken jurisdiction of the subject-matter set forth in said petition and found that said letters had come into possession of the Government as the result of its own unlawful act in unlawfully seizing same and confiscating same by its warden and admitting same in evidence in violation of its own Constitution was reversible error.*

Weeks v. *U. S.,* 232 U. S. 383.
U. S. v. *Mounday,* 208 Fed.
Boyd v. *U. S.,* 116 U. S. 616.
Underwood v. *State,* 78 S. E. 1103.
Ruqher v. *State,* 94 Ga. 366.
Warden on Criminal Evidence, Sec. 516, F. p. 1076.
U. S. v. *Wongquong,* 94 Fed. 832.

Ex Parte Jackson, 96 U. S. 727.
Bram v. *U. S.*, 168 U. S. 532.
4th Amendment U. S. Const.
U. S. v. *Wilson*, 163 Fed. 338.
Rex. v. *Barnett*, 3 C. & P. 600.
Rex v. *Kenzie*, 7 C. & P. 477.
Tsiueshee v. *Backus*, 243 Fed. 553.
Wise v. *Henkel*, 200 U. S. 556.
U. S. v. *McHie*, 194 Fed. 894.
Lyman v. *U. S.*, 241 Fed. 948.
U. S. v. *Hee*, 219 Fed. 1020.
U. S. v *.Abrams*, 230 Fed. 315.
U. S. v. *Friedburg*, 233 Fed. 317.
U. S. v. *Jones*, 230 Fed. 266.
U. S. v. *Lombardo*, 228 Fed. 981.
U. S. v. *Mills*, 185 F., d. 318.
Flag v. *U. S.*, 233 Fed. 467.
People ex rel. Ferguson v. *Reardon*, 197 N. Y. 236.
People v. *Beal*, 143 N. Y. 107.
People v. *Combs*, 36 App. Civ. 284-293-294.
Matter of Erich v. *Root*, 134 id. 432-437-438.
Matter of Foster, 139 id. 769-774-779.
People v. *Rosenheimer*, 70 Misc. 433.

After the killing of Turner the prison officials placed defendant, Stroud, in the isolation ward or department of the penitentiary. He was accorded the privilege of writing to his relatives occasionally and induced to believe that any letters written by him were being transmitted through the mails. Ordinarily prisoners placed their mail in a duly designated mail box, but the prisoners in the isolation department were authorized to deliver their mail directly to a carrier duly appointed by the Government for that purpose and commonly

known as a guard. All of the letters written by Stroud were duly delivered to this carrier and notwithstanding the fact that all the officers of the prison by their acts and conduct led Stroud to believe that such letters were being duly transmitted, they confiscated those incorporated in the record. The warden admitted that he knew that Stroud assumed the letters were all being transmitted in the regular course of the mails and notwithstanding his acts and conduct had misled Stroud into the belief that the privilege ostensibly granted him was granted in good faith, yet the warden merely used it as a means to perpetrate a fraud upon the defendant. The warden admitted that he deliberately and intentionally confiscate the letters for the express purpose of enabling his employer, the Government, to use them as evidence against Stroud.

The excuse given by the Government in the answer of the district attorney for this fraudulent and high-handed conduct was that Stroud "*had no civil rights and was not a person as contemplated by the Fourth and Fifth Amendments to the Constitution* of the United States."

The basis for the statement that defendant is not a person and that he was therefore a nonexistent or disembodied spirit seems to be that he was a felon. We know of no provision of the Federal Constitution or any Act of Congress which visits the civil death incident to conviction of felony at common law upon a federal convict. On the contrary federal convicts are included within the provisions of the Bill of Rights.

The second paragraph of the response to defendant's petition for the return of his letters is as follows:

> "That during the entire month of March and April, 1916, the defendant Robert F. Stroud was a convicted felon, serving in the United States penitentiary at Leavenworth, Kansas, a sentence of twelve years imposed upon him by the United States Court for the District of Alaska, for the crime of manslaughter, committed in the District of Alaska in the month of January, 1909, which sentence and judgment was pronounced against the defendant, in and by said court on August 23, 1909. That on account of being such convicted felon, so serving said sentence as aforesaid, which sentence defendant is still serving, the defendant during the months of March and April, 1916, had no civil rights and was not a person as contemplated by the Fourth and Fifth Amendment to the Constitution of the United States."

The foregoing paragraph discloses that the prosecuting officers already regard the defendant as one who is dead, to whom they owe no moral or legal obligation, and the action of the court shows that it concurred with them. That is to say, the court took the position on this phase of the case that the defendant was not a person or one of the people included in the constitutional guarantees, and yet, the court was undertaking to conform to constitutional forms by the mere fact that it accorded the defendant the right of trial in apparent conformity to the constitutional provisions. The error of the trial judge resulted

from applying to defendant the punishment incident to conviction for felony at common law and failure to reflect that no common law incident whatsoever attaches to a sentence imposed by a Federal Court upon a defendant. As there are no common law offenses against the United States (*U. S.* v. *Eaton,* 144 U. S. 677; *U. S.* v. *Hudson,* 7 Cranch, 32; *U. S.* v. *Coolidge,* 1 Wheat 415; *U. S.* v. *Britton,* 108 U. S. 199; *Manchester* v. 139 U. S. 240; *U. S.* v. *Dietrich,* 126, 676), its courts can inflict no common law punishments. They are wholly without jurisdiction to do so. The civil death which the district attorney and the trial court visited upon the defendant could only have been visited upon him by virtue of some written statute. We have much doubt as to whether Congress could pass a law which would entail the consequences of civil death upon conviction of a felony. This for the reason that such punishment is one of the incidents of attainder and men have certain rights which have been recognized as fundamental and inalienable and cannot be abrogated by a Government based upon principles which resulted in the formation of the republic. It was a principle of public law universally recognized before the Revolution that a slave had no rights which a freeman was bound to recognize. That is to say, he was not a person nor one of the people constituting society. But the Constitution of the United States specifically recognized slaves as persons in the eye of the law and as constituting part of the people or body politic who were entitled to representation in the National Legislature and whose rights

were to be safeguarded by the law applicable to ordinary persons and enforced in the courts. By the third paragraph of Section Two of Article One of the Constitution representatives were apportioned and direct taxes imposed in accordance with a standard to be "determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons." It is common knowledge that the three-fifths of all other persons referred to slaves so that for the purpose of representation and taxation the Constitution recognized that even a slave was three-fifths of a person. Section 9, of Art. 1, of the Constitution recognized that slaves were persons by preventing Congress from prohibiting their importation. The third paragraph of Section 2, Art. 4, also categorically recognized that a slave was a person. It would seem that the Thirteenth Amendment in a sense, places a convict in the same category as a slave. From the foregoing it follows that the rights secured by the amendments to the Constitution refer to the rights which belong to men as men, and not to rights which belong to them alone as citizens or slaves or convicts. Judge Cooley, in his Principles of Constitutional Law, 3d Edition, page 295, says:

> "When the term 'the people' is made use of in constitutional law or discussions, it is often the case that those only are intended who have a share in the Government through being clothed with the elective franchise. * * *
>
> But in *all* enumerations and guaranties of *rights* the *whole people are intended, because*

> *the rights of all are equal, and are meant to be equally protected.* In this case, therefore, the right to assemble is preserved to all the people, and not merely to the electors, or to any other class or classes of the people."

It thus appears that the right of the people mentioned in the First Amendment was a right which was preserved not only to the enfranchised citizen, but to those who were disfranchised for any reason. It is difficult to understand how the word "people" in the First Amendment includes those who have a right to exercise the franchise as well as those who have not and how the same word used in the Fourth Amendment has a more restricted meaning. The contention of the Government that the defendant was not a person and that he had no civil rights and that he is not included in the provisions of the Fourth and Fifth Amendment to the Constitution, is based upon the notion that the Constitution is not an impersonal and all-embracing organic law, but that it is restricted in its application and protects the rights of certain classes of men only. But this court has ruled to the contrary by holding that even a convicted alien Chinaman was a "person" within the meaning of the Fourth and Fifth Amendments. In *Wong-wing* v. *United States*, 163, U. S. 228, this court said (per Field, J.) l. c. 242:

> "The term 'person,' used in the Fifth Amendment, is broad enough to include any and every human being within the jurisdiction of the republic. * * *

> The contention that persons within the territorial jurisdiction of this republic might be beyond the protection of the law was heard with pain on the argument at the bar—in face of the great constitutional amendment which declares that no state shall deny to any person within its jurisdiction the equal protection of the laws. Far nobler was the beast of the great French Cardinal who exercised power in the public affairs of France for years, that never in all his time did he deny justice to any one. 'For fifteen years,' such were his words, 'while in these hands dwelt empire, the humblest craftman, the obscurest vassal, the very leper shrinking from the sun, though loathed by charity, might ask for justice.' "

The Government is in the incongruous position of undertaking to do justice to defendant and yet denying that he is entitled to justice.

If he be not a person then why have him indicted? The answer of course will be that the Fifth Amendment requires it. But how, if he be not a "person" such as that amendment contemplates? The prohibitions of the Fifth Amendment begin with the words "no person." The Government by indicting defendant *ipso facto* concedes that he is a person. If it concedes that, it cannot deny him the benefit of the first clause, how can it deny him the benefit of the other clauses? Those words constitute the predicate of the Amendment and of each and all of its provisions. We find that for the purpose of administering justice even a slave was held to be a

person (Hunder, Roman Law, 160; *State* v. *Thackman,* 1 Bay. [S. C.] 358). An Indian is held to be a person (*U. S.* v. *Crook,* Fed. Cas. 14891) for the same purpose. The estate of a decedent is a person. (*Billings* v. *State,* 107 Ind. 54.) It has been held that neither a "goat" (2 Q. B. 109) or a "dog" (*Heisrodt* v. *Hackett,* 34 Mich. 283) are persons. Even Guiteau, who murdered a president, was held to have a right to protection from his guard and this court denied his murderous warden's claim that Guiteau was not under the protection of the Constitution. (*Ex Parte* Mason, 105 U. S. 696.) If a man convicted of murdering a president of the United States be a "person" within the meaning of the Constitution, surely a man convicted of murdering a prison guard of the United States likewise is a "person." Outlaws are protected by the law. (Wharton on Cr. Law Sec. 177.) In *U. S.* v. *Crook, Supra,* it is said:

> "Webster defines a 'person' as a 'living soul; a self conscious being; a moral agent; especially a living being; a man, woman, or child; an individual of the human race.' This is comprehensive enough to include even an Indian."

The Fourth Amendment put the warden of the penitentiary under certain limitations and restraints in the exercise of his power and authority as warden. He could not place defendant on the rack and compel him to disclose the facts mentioned in the letters seized by him and thereafter have the trial court admit the confession. Neither

could he by hopes fraudulently held out to defendant obtain his oral recital of the facts mentioned in the letters and have this court permit a jury to listen to a repetition of such recital. Yet, in a sense, that is what the warden did in this instance. After the death of Turner, the guards of the penitentiary, in obedience to the command of the warden, put defendant in a solitary cell, that is to say, in isolation, and charged him with the murder. The defendant, knowing the gravity of the charge, and perhaps for the purpose of having his friends and relatives believe that he was in dire stress, and for the purpose of inducing them to come to his aid, wrote the letters in question while laboring under the impression or hope inspired by the warden and his guards that same would be transmitted through the United States mails. The warden expressly admits that he knew that his conduct and that of the guards in charge of defendant had inspired a hope, if nothing stronger, that the letters would be so transmitted, for he says:

> "A. I would assume that he would hope, at least, they were being transmitted.
>
> Q. What was your idea in confiscating them? A. I thought they might be used in the furnishing of details.
>
> Q. Against Mr. Stroud — you confiscated them to use as evidence against Mr. Stroud? A. You ask me that question or do you assume it?
>
> Q. I am asking you if that is a fact, Mr. Morgan? A. Yes, sir." (75-76.)

Thus it appears that if defendant was sane the confessions contained in the letters were made because of the hope of aid which defendant assumed he would get as a result of the facts set forth in the confessions. The stronger he could state the facts against himself in those letters, the more certain he was, in his opinion, to cause his friends and relatives to rally to his assistance. Hence, he had a motive for exaggeration and false statements, and these exaggerations and false statements resulted from the false hope generated by the penitentiary officials. This is the very type and character of conduct which renders a confession or statement in the nature of a confession made by a defendant inadmissible. In Cooley's Constitutional Limitations, 7 Ed., p. 444, it is said:

> "But to make it admissible in any case it ought to appear that it was made voluntarily, and that no motives of hope or fear were employed to induce the accused to confess. The evidence ought to be clear and satisfactory that the prisoner was neither threatened nor cajoled into admitting what very possibly was untrue. Under the excitement of a charge of crime, coolness and self-possession are to be looked for in very few persons; and however strongly we may reason with ourselves that no one will confess a heinous offense of which he is not guilty, the records of criminal courts bear abundant testimony to the contrary. If confessions could prove a crime beyond no doubt, no act which was ever punished criminally would be better established than witchcraft; and the judicial executions which have been justified by such

> confessions ought to constitute a solemn warning against the too ready reliance upon confessions as proof of guilt in any case. As 'Mr. Justice Parke several times observed,' while holding one of his circuits, 'too great weight ought not to be attached to evidence of what a party has been supposed to have said, as it very frequently happens, not only that the witness has misunderstood what the party has said, but that by unintentionally altering a few of the expressions really used, he gives an effect to the statement completely at variance with what the party really did say.' And when the admission is full and positive, it perhaps quite as often happens that it has been made under the influence of the terrible fear excited by the charge, and in the hope that confession may ward off some of the consequences likely to follow if guilt were persistently denied."

In *Weeks* v. *U. S.*, 232 U. S. 383, the court held that the Fourth Amendment not only limited the power of the courts, but of all officers of the Government entrusted with the enforcement of the laws, thus:

> "The effect of the Fourth Amendment is to put the courts of the United States and *Federal officials*, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects, against all unreasonable searches and seizures under the guise of law. This protection *reaches all alike, whether accused of crime or not*, and the duty of giving to it

> force and effect is obligatory upon *all* entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."

In *U. S.* v. *Wong Quong Wong*, 94 Fed. 832, the Government produced letters written in Chinese which had been handed by the defendant to an employee of the Government, by whom they were turned over to a customs official, who in turn had them translated. These letters were offered in evidence. The court, citing the opinion of this Court in *Boyd* v. *U. S.*, 116 U. S. 616, said:

> "Such papers procured in that way cannot be used in evidence against persons from whom they were procured without violating the protection afforded by the amendments to all persons in this county. It has been said that the manner of obtaining such evidence, whether by force or *fraud*, does not affect its admissibility; but these constitutional safeguards would be deprived of a large part of their value if they could be invoked only for preventing the obtaining of such evidence, and not for protection against

> its use. The cases cited show that they cover the use of papers or testimony when it would be a carrying out of their violation."

Thus we find that the constitutional prohibitions are directed against *fraud,* as well as *force.* This is merely a construction applying the rule of the common law to the amendments in question. In Section 219, in Greenleaf on Evidence, it is said:

> "Before any confession can be received in evidence in a criminal case, it must be shown that it was voluntary. * * * The material inquiry, therefore, is whether the confession has been obtained by the influence of hope or fear applied by a third person to the prisoner's mind. The evidence to this point, being in its nature preliminary, is addressed to the judge, who admits the proof of the confession to the jury or rejects it, as he may or may not find it to have been drawn from the prisoner, by the application of those motives."

The act of the warden in confiscating the letters to use as evidence against Stroud, after having caused him to hope that they would be transmitted through the mails, was an act of force in combination with acts of fraud which resulted, first, in causing defendant to write the statements, and, second, in forcibly seizing the papers on which the statements were written. The effort of the trial court and its officials to bring defendant to punishment was aided only by their

sacrificing defendant's constitutional right. Hence their acts cannot be approved by this Court, for in *Weeks* v. *U. S., supra*, l. c. 393, it said:

> "If letters and private documents can thus be seized and hold and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution *The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.*"

XI.

It was error to permit the jury to carry the indictment containing the indorsement "penalty death" for the reason that said indorsement together with the attitude of the court and prosecutor tended to influence the jury to vote for a verdict which would result in capital punishment.

At the close of his charge the trial judge said: "The bailiff will take the jury. The jury may also have the indictment" (478). This was done. This was error. (*Ogden* v. *U. S.*, 112 Fed. 523; *Holmgren* v. *U. S.*, 217 U. S. 509; *Matton* v. *U. S.*, 146 U. S. 140.)

XII.

The court erred in omitting to submit the issue of defendant's insanity to the jury.

At the close of the evidence the court stated in the hearing of the jury that there was no evidence in the case upon which an issue of excusable homicide could be submitted to the jury on the ground of insanity. The court omitted in his charge to the jury to submit that issue (468). The testimony of the witness Darnell categorically demonstrated that there was a doubt in the minds of the hospital officials concerning the sanity of the defendant (447, 448). He was in the hospital for "observation from a psychopathical point of view" (448). The letters introduced in evidence in themselves demonstrated that defendant was insane. The court committed error in declaring as a matter of law that defendant was sane when it was a matter of fact for the jury to determine.

XIII.

The judgment imposed upon the defendant included solitary confinement from the date of sentence to the date of execution. The solitary confinement feature was not authorized by law and consequently the judgment is invalid and must be reversed.

The judgment is shown at page 29 of the record.

It has been held by the Supreme Court in *Medley, Petitioner,* 134 U. S. 160, that placing a convict in solitary confinement where the law author-

izing the sentence does not warrant such confinement, entitles the convict to be discharged on *habeas corpus,* and also that the Constitution of the United States prohibiting cruel and unusual punishment does not authorize a Legislature to enact a law providing for such punishment. It also holds that such punishment cannot be considered as a mere prison regulation. Said the court:

> "This matter of solitary confinement is not, as seems to be supposed by counsel, and as is suggested in an able opinion on this statute, furnished us by the brief of the counsel for the State, by Judge Hayt (in case of Henry Tyson), a mere unimportant regulation as to the safe keeping of the prisoner, and is not relieved of its objectionable features by the qualifying language, that no person shall be allowed access to said convict except his attendants, counsel, physician, a spiritual adviser of his own selection, and members of his family, and then only in accordance with prison regulations.
>
> Solitary confinement as a punishment for crime has a very interesting history of its own in almost all countries where imprisonment is one of the means of punishment. In a very exhaustive article on this subject in the American Cyclopaedia, Volume XIII, under the word 'Prison,' this history is given. In that article it is said that the first plan adopted when public attention was called to the evils of congregating persons in masses without employment was the solitary prison connected with the Hospital San Michele at Rome, in 1703, but little known prior to the experiment in Walnut Street penitentiary in Philadelphia in 1787. The peculiarities of

> this system were the complete isolation of the prisoner from all human society, and his confinement in a cell of considerable size, so arranged that he had no direct intercourse with or sight of any human being, and no employment or instruction. Other prisons on the same plan, which were less liberal in the size of their cells and the perfection of their appliances, were erected in Massachusetts, New Jersey, Maryland and some of the other states. But experience demonstrated that there were serious objections to it. A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others, still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community. It became evident that some changes must be made in the system, and the *separate* system was originated by the Philadelphia Society for Ameliorating the Miseries of Public Prisons, founded in 1787."

The court then refers to the statutory history of solitary confinement in the English law and concludes therefrom "as showing, first, what was understood by solitary confinement at that day, and, second, that it was considered as an additional punishment of such a severe kind that it is spoken of in the preamble as 'a further terror and peculiar mark of infamy' to be added to the punishment of death. In Great Britain, as in other countries, public sentiment revolted against this severity, and

by the Statute of 6 and 7 William IV, c. 30, the additional punishment of solitary confinement was repealed" (l. c. 170).

The court has subjected the defendant to the torture incident to solitary confinement since the date of the sentence. The judgment and sentence is for this reason erroneous.

Conclusion.

The judgment should be reversed and defendant discharged.

Respectfully submitted,

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In the Supreme Court of the United States.

OCTOBER TERM, 1919.

ROBERT F. STROUD, PLAINTIFF IN error,
v.
THE UNITED STATES OF AMERICA. } No. 276.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT OF CASE.

(*a*) The plaintiff in error, Robert F. Stroud, was indicted in the April, 1916, term of the District Court for the First Division of the District of Kansas for that, on March 26, 1916, within the prison walls of the United States penitentiary at Leavenworth, Kans., he did, with malice aforethought, kill one Andrew F. Turner (R. 4). He was tried at a special term of said court in May, 1916 (R. 5), was convicted of murder in the first degree, and sentenced to be hung (R. 20). He sued out a writ of error from the Circuit Court of Appeals, and on that proceeding the United States confessed error for the sole reason that the trial court had not specifically instructed the

jury that they might qualify their verdict by adding the words "without capital punishment." (Sec. 330, Criminal Code.) The judgment was accordingly reversed, and the cause remanded for a new trial (R. 21).

Stroud was again tried at a special term of the court in May, 1917, was convicted of murder in the first degree without capital punishment, and was sentenced to imprisonment for life (R. 22, 23.) He sued out a direct writ of error from this court, and in that proceeding the United States confessed error for the sole reason that the trial court had refused to receive, on behalf of the defendant, the testimony of convicted felons, contrary to the decision of this court in *Rosen* v. *United States*, 245 U. S. 467 (R. 23, 24, 25). Accordingly the judgment of the district court was reversed, and the cause was remanded for further proceedings (R. 25). The present writ of error from this court deals with the proceedings on the third trial had in accordance with the above mandate of this court.

(*b*) The testimony offered by the Government showed that the defendant, Stroud, a convict in the United States penitentiary at Leavenworth, Kans., under a 12-year sentence for the crime of manslaughter committed in Alaska in January, 1909, at dinner time, in the dining room of United States penitentiary at Leavenworth, Kans., arose from his seat at the table under the pretense of retiring to the toilet; that upon arising he went toward the deceased, Guard Turner, instead of going toward the toilet; that

Turner was walking with his club under his left arm and his hands behind him; that the defendant spoke to Turner and Turner nodded his head; that, thereupon, immediately there was a quick thrust by the defendant with his left hand at the breast of Turner; that the defendant had in his hand a dagger which he had concealed in the coat of his Sunday uniform; that he stabbed Turner with it at that time and as he did so Turner straightened up and feebly attempted to draw his club, when the defendant took hold of it with one hand, and thereupon Turner sank to the floor dead; that this happened within the walls of the United States penitentiary at Leavenworth, Kans., on Sunday, March 26, 1916, the same being a place within the exclusive jurisdiction of the United States. This state of facts is established by the testimony of 12 witnesses on behalf of the Government. By reason of the unusual detail with which the evidence is set forth in the bill of exceptions, reference is made to the testimony of each witness bearing upon the aforesaid occurrence (R. 228, 229, 247, 251, 263, 268, 279, 285, 288, 293, 299, 300, 308, 330, 331, 340, 351).

The defendant described the killing in certain writings which were handed by him to the prison officials, under the rules and regulations of the institution, with a view of having the same mailed by the warden after inspection. However, by reason of the fact that the same offended against the rules and regulations in setting forth details concerning a crime and for the further reason that the same indicated the intent with which the defendant had committed

the act made the subject of this indictment, the writings were not mailed, but were detained by the warden and called to the attention of the United States officials in charge of the prosecution of the defendant, Stroud, for the murder of Guard Turner (R. 365, 368, 369, 371, 374, 377). These letters were admitted in evidence and are set out below:

LEAVENWORTH, KANSAS, 3–29, 1916.

* * * I got the fruit and candy Saturday and I am very sorry I didn't get to see you and I hope I may see you soon—I guess you know by this time that I killed a guard Sunday noon—I am at present in sol. confinement. I am getting on very well and in fact feel better than I have for some time—The reason of it is that my mind is at rest. I guess you have seen the papers but I don't know how neer they are to speaking the truth—I have not seen them—Any way if they give any reason for the killing you can figure that it is only a guess for I have not told any one why I done it.—They asked me and I told them I would tell that to a jury—I guess I will get life for it but that is of no moment—I will be just as well off doing life as the way I was before— * * *

* * * I can get "by" just as easy without a cent as I could any way for I can't denigh killing the man and my reasons may or may not be considered sufficient to justify my action, the most they can do is to give me life anyway and I don't cair for that if I can make them send me to one of the other prisons—I shall try to get sent back to the "Island"—
* * *

LEAVENWORTH, KANSAS, 3–21, 1916.

* * * Well mother I can not tell you as much as I would like to—I can say that I am very sorry for the mans family, but he wouldn't be sorry for mine if it was the other way around—I cant say that I am in any way sorry for my action—I have acted right in the mind of all fair thinking people who have any knowledge of the conditions—The public will take the same view I am sure when they realy under stand. The people of Kansas as a rule are pritty liberal and the are not fools enugh to over look the conditions. As far as I can under stand the papers have been as fair as could be asked of them—Of course things must look bad now for I wont talk but wait till I do, it is ten to one I have the papers with me—They are the people and it is them that tries a man—
* * *

LEAVENWORTH, KANSAS, 4–2, 1916.

* * * I have what may be a peace of supprizing news for you, and it will explain why I have not seen Mr. Bonner. One week ago today at the noon meal I got up from the tabel and walked up to a guard who was standing in the aisle just ahead of where I was sitting—we talked of few minutes and he started to walk a way. I spoke and he stopped, then started away again. I made a quick movent with my left hand and he straightened up real quick and a very funny look on nis face and then he staggered and fell. He took sick and died of heart trouble shortly after than—and as a result I am in solitary confinement waiting to be tried for murder—You see the people seem

to think his heart was alright befor I made that move with my left hand—I wasnt but I wont discuss that—After I made that move it had a good sized dagger wound in it. * * *

LEAVENWORTH, KANSAS, 4–4, 1916.

* * * Sunday March 26th at the noon meal I got up from the tabel and walk up the aisle to where a guard was standing and started to talk to him. We talked very quitly and stood very close together but any one looking at out faces could see that our words must be very intence—we all at once brake away from each other the guard reaching for his clud which was under his left arm with his right hand and my self making a very quick movement with my left hand which had been at my side—Then we both stepped back and the guard seemed to be sick. He caught at the tabel behind him, staggered a littel and slipped to the floor. He died shortly afterwards of heart failure—The [unintelligible word here] seems to hold that his heart was alright befor I made that move with my left hand—It wasnt and I will have to prove that when I go to trial. When they give the dead guard the once over they found that he had a dagger wound avout six inches deep that passed through his heart. * * *

LEAVENWORTH, KANSAS, 4–7 1916.

* * * Mother says she shall get me a lawyer and try and see that I get a square deal—I hate to see her waist her money for I thing I will have as good a chance any way—And on the other hand I am so tired of going

time that I dont cair much what they do about it—The worst they can do would be to give me life—I think I have a good chance to beat them—

I have never give any one any reason for doing it so they wont have much to work on only that I killed him and that wont do much good for I will admit that— * * *

LEAVENWORTH, KANSAS, 4–16, 1916.

* * * Mother had obtained the best lawyer in the State and I have a fine chance to beat this case—I learned yesterday that the grand jury had found a true bill for first degree against me. I am pleased for I have a better chance against a first degree case than I would have against a man slaughter case— * * *

There was evidence (R. 288) that at the time of the fatal blow Stroud said, "Damn you, you won't report anyone else." That on the Saturday evening previous the deceased Turner had taken the number of Stroud for misconduct with a view of reporting him for talking aloud at the table. There was nothing to show that he in fact actually reported Stroud (R. 293). Another witness testified that at the time Stroud stabbed Turner he said, "He would not report anybody else" (R. 297). It was also in the testimony that on Saturday evening before the occurrence, at the time the guard asked Stroud for his number, the same being preliminary to the making of a report for misconduct, the defendant, Stroud, said, "If he shoots me, I will take care of him,"

"shooting" meaning in the prison parlance to report a man to the warden for misconduct (R. 299, 300). Evidence was introduced by the Government that after the fatal encounter the defendant was overheard in conversation with another prisoner in the isolation cell house to say that he intended on Saturday to kill Turner; that when Turner was down the aisle he asked him if he reported him and Turner said, "No," and looked him square in the eyes, and that when Turner dropped his eyes he gave it to him 2½ inches from the center, and that Turner looked sick and started to fall, and that he would have given him another, but that Capt. Purcell came up (R. 340). Also, that in the conversation with the guard, Alexander, the defendant said, that he killed Turner "because he was a dirty rat" (R. 330); that he knew he would catch Turner in the dining room, saying, "I figured that out in the gallery; I knew my cell and I knew what aisle he would be standing in when I marched out from dinner, and I knew where I could get him" (R. 331).

The defendant contended by the testimony produced in his behalf that the deceased Turner drew his club on the defendant, and that the defendant grabbed it once or twice, and struggled over it with Turner; that thereupon the deceased did raise his club, as if to strike the defendant, and that while the club was thus raised and held in the air the defendant struck the fatal blow with the knife he had concealed upon his person; also, that the reputation of the

deceased for violence and cruelty to the prisoners was bad among the convicts (R. 383–450).

In rebuttal the Government offered evidence tending to show that the reputation of the deceased as to the qualities referred to by the defendant both at Leavenworth and Atlanta prisons was good (R. 451–468).

The defendant's trial was conducted with fairness throughout. The court fully presented the law applicable to the issues of not guilty and justifiable homicide in his charge (R. 470–478). The jury returned a verdict of guilty of murder in the first degree, without qualification (R. 483).

ASSIGNMENTS OF ERROR (R. 488–494).

Fourteen assignments of error are presented for consideration. The first relates to the alleged error of the court in denying the petition of the defendant for a transfer of the place of trial from the division in which it was moved for trial to another division of the District of Kansas (R. 38). The grounds of the application for the change of venue were (1) that the case had been tried twice in the First Division of the District of Kansas, and that each time had been reversed and sent back for trial de novo upon confession of error on the part of United States; (2) that the minds of the inhabitants of Leavenworth and of the First Division of the District of Kansas (which consists of 50 counties) were prejudiced against the defendant by reason of said trials and the proceedings therein and by reason of comments

of the public press of the city and county of Leavenworth; (3) that a fair and impartial jury could not be secured in the First Division of Kansas by reason of the foregoing; (4) by reason of certain remarks and the reading of an affidavit in the district court by the United States district attorney, in the presence of the petit jury panel, at the time the defendant through his counsel applied for a continuance on the ground of the absence of two of his attorneys, Messrs. O'Donald and Kimbrell; that thereupon the defendant was denied an impartial trial in violation of the sixth amendment to the Constitution (R. 34, 35, 36, 37, 38, 487–488).

The second assignment of error is predicated upon the court's refusal to quash the petit jury panel for the reasons set forth in the first assignment of error (R. 38, 39, 40–488).

The third assignment (R. 489) is based upon the court's denial of a motion of defendant, made before the trial of the case, to the effect that judgment be rendered according to the alleged "law of the case," as established by the aforesaid mandate of this court, which established (so it is claimed) that the letters of the defendant quoted above could not be used against him. The twelfth assignment (R. 494) makes the same claim of res judicata and "law of the case" as to the aforesaid judgment of the Circuit Court of Appeals remanding the case for a new trial.

The tenth assignment (R. 493) is based on the denial by the court of a petition for the return to the

defendant of the letters referred to in assignment 3, and the eleventh assignment (R. 494) upon the admission of said letters.

The fourth assignment is that the trial court erred in sustaining a challenge for cause to 15 veniremen, who stated upon their voire dire that they had conscientious scruples against the imposition of capital punishment in first-degree murder cases (R. 81, 92, 102, 111, 132, 137, 143, 163, 167, 172, 188, 193, 170, 199, 206). Under this assignment the defendant contends that by reason of the action of the trial court in sustaining such challenges for cause upon the ground aforesaid a rule of qualification not recognized by the laws of the State of Kansas was imposed to the prejudice of the defendant; that under the provisions of the law of Kansas the punishment for first degree murder was prescribed as imprisonment in the penitentiary for life, and that the law of the State of Kansas provides that a juror who has conscientious scruples against the imposition of capital punishment shall be a qualified juror to try a defendant on a charge of first degree murder; that the court violated section 275 of the Judicial Code of the United States, which prescribes that "jurors shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions as jurors of the highest court of law in such State may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned."

The fifth assignment (R. 491) is based upon the denial of a challenge for cause to two veniremen who expressed opinions in favor of capital punishment for murder in the first degree. Neither of the two, however, became a member of the trial jury (R. 483, 484).

The sixth assignment (R. 492) is based upon the claim that the court, in charging the jury as to evidence bearing upon the plea of self-defense, did not particularly comment on the testimony of a certain witness.

The seventh assignment (R. 492) alleges that the indictment failed to charge the offense for which defendant was convicted, and particularly that it failed to charge the locus as within the exclusive jurisdiction of the United States.

The eighth assignment (R. 403) relates to the admission of testimony as to conversations with the defendant after the crime and while he was in the isolation ward.

The ninth assignment (R. 493) alleges that the court erred in directing and permitting the jury to carry the indictment, having the indorsement "penalty, death," to the jury room. The record, however, does not show that this happened or that, if it did, the defendant objected.

Assignments 13 and 14 (R. 494) allege error in that the court did not submit the issue of insanity to the jury.

ARGUMENT.

I.

The alleged constitutional questions are frivolous, and the writ of error should be dismissed for lack of jurisdiction.

(*a*) A direct writ of error from this court is only granted in criminal cases under the provisions of section 238, Judicial Code, in a case involving the construction or application of the Constitution of the United States. As to the jurisdiction thus conferred, the court said in *Berkman* v. *United States* (250 U. S. 114, 117):

> Our jurisdiction depends upon whether the case really and substantially involves the constitutionality of the section in question as construed and applied.

In *Sugarman* v. *United States* (249 U. S. 182, 184) it is said:

> But mere reference to a provision of the Federal Constitution, or the mere assertion of a claim under it, does not authorize this court to review a criminal proceeding; and it is our duty to decline jurisdiction, unless the writ of error presents a constitutional question substantial in character and properly raised below.

This rule has as great binding force in the case of a person convicted of murder and sentenced to death as in other cases. (See *Beecham* v. *United States*, 223 U. S. 708.)

(*b*) The first assignment of error claims that the provision of the sixth article, viz—

> the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the

> State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law,

was violated by the action of the court in denying a motion for a change of venue to another division of the district on account of local prejudice against the defendant. The Constitution, however, does not guarantee to a defendant the right to be tried in any particular place in the district or by a jury drawn from any such particular place. It provides that the district must be previously ascertained by law, but Congress has complied with this injunction by providing in section 40, Judicial Code, that the trial of offenses punishable with death shall be had in the county where the offense was committed (the venue of the trial in the case at bar), where that can be done without great inconvenience; and in section 53, Judicial Code, that the prosecution shall be in the division of the district where the crime was committed, unless the court, on the application of the defendant, shall order the case transferred to another division. In the case at bar the district had been by law previously ascertained, and the defendant was tried in such district. The Constitution guaranteed him nothing more.

(*c*) The second assignment sets up a violation of the same provision of the Constitution, of section 2 of article 3, fixing the scope of the judicial power, and of article 5, that no person shall be deprived of his life without due process of law, in overruling a motion to quash the jury panel. In so far as the

claim is based on the latter two provisions, it is so flimsy as not to deserve serious consideration. In so far as it is based on the requirement of an impartial jury of the vicinage, it is almost equally frivolous. This requirement does not fossilize and preserve forever a right to a challenge to the array of the petit jury, and especially to a challenge based, not upon any defect in the law relating to the panel or upon any bias, partiality, or fraud of the officer selecting it, but upon an alleged taint of prejudice in the whole panel acquired by testimony of certain proceedings in court. The jury actually selected will be presumed to have been, nevertheless, "impartial" within the meaning of the Constitution.[1]

(*d*) Assignments of error 3 and 12 assert a violation by the trial court of article 6 relating to due process of law in refusing to follow "the law of the case;" as determined by the mandates of the Circuit Court of Appeals and of this court. The refusal of a trial court to give the effect of *res adjudicata* to a previous judgment between the same parties, however erroneous such a refusal may be, does not deprive a party of due process of law. He has had his day in court, has had the decision of a court of competent jurisdiction, and if aggrieved thereby may prosecute error. Indeed, the claim of the plaintiff

[1] Challenges to the array are the province of municipal law, and may be regulated by it. See Thompson on Trials 2d ed., secs. 31 et seq.; *United States* v. *Reed*, 2 Blatch 435. The law of Kansas seems to permit of challenges to the array only in case of corruption on the part of the officer. (General Laws, Kansas, sec. 8240.) And see *Rawlins* v. *Georgia* (201 U. S. 638, 640).

in error under this assignment seems itself contrary to article 7 of the Constitution, providing that no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law. This provision prohibited the Circuit Court of Appeals or this court in the case at bar from determining the verdict of the jury or doing anything more than grant a new trial. (See *Slocum* v. *Insurance Company*, 228 U. S. 364.)

(*e*) The fourth assignment claims a violation of the same provisions of the Constitution relating to an impartial jury and due process in sustaining a challenge for cause to certain jurors who had conscientious objections to capital punishment. Since, according to the decision of the court in *Logan* v. *United States* (144 U. S. 263, 298), to have overruled the challenge would have been to deny an impartial jury, the frivolity of the claim is apparent.

(*f*) The fifth assignment asserts a violation by the trial court of the provisions of article 6 relating to an impartial jury in overruling a challenge for cause to two of the jury panel who, it is claimed, stated they would never vote for less than capital punishment in a case of murder in the first degree. Neither of these men, however, was on the trial jury (R. 483, 484), so that, under the rule laid down in *Hayes* v. *Missouri* (120 U. S., 68, 71), and *Hopt* v. *Utah* (120 U. S. 430, 436), the overruling of a challenge for cause to them did not deny the constitutional right to an impartial jury.

Even assuming that the defendant had exhausted the peremptory challenges allowed him by law, and assuming that the court clearly committed error in not sustaining his challenge for cause, his constitutional right was not denied him without some further showing upon his part that the trial jury, as actually selected, was not impartial. This he could only do by challenging some one of that jury either for cause or peremptorily, and excepting to the action of the court on such challenge. In the absence of such objection on his part, this court must presume that the jury was in fact impartial within the meaning of the constitutional objection.

However, as a matter of fact, the record shows that the defendant was allowed to exercise 22 peremptory challenges (R. 208, 210), 2 more than the number fixed by law, so that the case is just the same as though his 2 challenges for cause had been allowed, and is therefore entirely controlled by *Hopt* v. *Utah*, supra.

(*g*) The alleged constitutional point raised in the sixth assignment is not worthy of notice.

(*h*) The same may be said as to the alleged failure to charge and prove that the locus of the offense was within the exclusive jurisdiction of the United States, a failure which, if made out (as it is not), is no more than error in the trial court.

(*i*) The same is true of the ninth assignment, complaining that the jury was permitted to take the indictment into the jury room.

(*k*) The eighth assignment deals with the testimony of two witnesses detailing conversations with the defendant while he was in the isolation ward. It is claimed that the admission of this testimony violated the provision of article 4 that—

> no person shall be compelled in a criminal case to be a witness against himself.

This provision, however, relates only to *testimonial* compulsion, and not to the rule of evidence that nonvoluntary confessions are inadmissible. In *Counselman* v. *Hitchcock* (142 U. S. 547, 562), the court said:

> The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard.

This view is reaffirmed in *Hale* v. *Henkel* (201 U. S. 43, 66, 67).

In *Johnson* v. *United States* (228 U. S. 457), a transfer of the defendant's books to his trustee was compelled by the provisions of the bankruptcy law, but it was held that they could be used against him in a prosecution for violating that law because the compulsion was a necessary incident to the distribution of his property and not in order to obtain criminal evidence against him. It is said (p. 458):

> A party is privileged from producing the evidence but not from its production.

See also Wigmore on Evidence (vol. 3, sec. 2266).

The admission of the testimony in question, therefore, did not violate any constitutional right of defendant but merely a right established by the law of evidence, and if erroneous can not be corrected by a direct writ of error from this court.

(*l*) As to the admission of the letters complained of in assignments 10 and 11, the constitutional question was determined adversely to the plaintiff in error in *Johnson* v. *United States*, supra, and *Perlman* v. *United States* (247 U. S. 7, 14, 15). The letters were not taken from the plaintiff in error, but were delivered by him voluntarily to the prison officials to be dealt with by them as the regulations prescribed.

(*m*) The thirteenth and fourteenth assignments claim a violation of the sixth article in that the court improperly excluded the issue of insanity by charging that there was no evidence of justifiable homicide. If so, it may have been error, but it could not have been a violation of any constitutional rights, since the sixth article has nothing in it remotely bearing on the matter.

II.

Assuming that this court has jurisdiction, the assignments of error are not well taken.

(*a*) *Assignment 1.—Change of venue.*—Such matters are within the sound discretion of the trial court, and will not be reviewed on error except upon clear showing of abuse of such discretion. (*Cook* v. *Burnby*, 11 Wall. 659, 672; *Kennon* v. *Gilmore*, 131 U. S. 22, 24;

Brown v. *United States*, 257 Fed. 46, 48.) No showing to that effect is made in this record. The examination of the jurors upon their voir dire showed that practically all of them knew little or nothing about the facts in the case, and had heard relatively but few reports thereof (R. 79, 212). None of the jurors was from Leavenworth County, all such having been excluded by order of court (R. 38, 78).

(*b*) *Assignment 2—Jury panel.*—If a challenge to the array because of alleged prejudice in the whole panel be permissible at all in the Federal courts (which is certainly doubtful), the matter is clearly within the sound discretion of the trial court, and its action is not reviewable on error except upon a clear showing of abuse of such discretion. No such showing is made in this record. The court could lawfully permit the jury to be present at the hearing of the motion for continuance (*Holt* v. *United States*, 218 U. S. 245, 248–250), and nothing occurred at such hearing which can fairly be said to have prejudiced them (R. 45–50).

(*c*) *Assignments 3 and 12—The "law of the case."*—Where a case is reversed and remanded for a new trial on confession of error by the State, there is no law of the case further than this, viz., that the defendant shall have a new trial. The reasons for the confessions of error are given above in the statement of this case, and the errors confessed were avoided on the retrial. This court knows what it intended by its mandate, and that the trial court obeyed it. (*Steinfeld* v. *Zeckendorf*, 239 U. S. 26, 30.)

(*d*) *Assignment 4—Sustaining challenges for cause.*—Challenges for cause in a criminal case in the Federal courts are not governed by State law. (*Lewis* v. *United States*, 146 U. S. 370, 379; *Pointer* v. *United States*, 151 U. S. 396, 411; *St. Clair* v. *United States*, 154 U. S. 134, 147, 148.) The assignment, therefore is not well taken.

(*e*) *Assignment 5—Overruling challenges for cause.*—This has been sufficiently dealt with under the first heading of this argument.

(*f*) *Assignment 6—Failure of court to comment on testimony of witness.*—A Federal judge is not bound to comment on any particular testimony. Moreover, the assignment is misleading, since the court expressly told the jury that in determining whether the guard first made an assault on defendant with a club, they should consider the testimony both on behalf of the Government and of the defendant (R. 474).

(*g*) *Assignment 7—Locus of offense.*—That the indictment duly charged the locus as within the exclusive jurisdiction of the United States, and the proof showed it (Purcell's testimony, R. 226, 230), is established by *Jones* v. *United States* (137 U. S. 202, 214); *Benson* v. *United States* (146 U. S. 325); *Battle* v. *United States* (209 U. S. 36); *Holt* v. *United States* (218 U. S. 245, 246, 252); *Brown* v. *United States* (257 Fed. 46, 48–50).

(*h*) *Assignment 8—Testimony as to statements made by defendant.*—In *Sparf* v. *United States* (156 U. S. 51, 55) it was held that the mere fact that a

defendant is confined and in irons under an accusation of having committed a capital offense does not render statements by him incompetent, if they were made voluntarily and not obtained by putting the prisoner in fear, or by promises; and the rule so laid down in that case is affirmed in *Bram* v. *United States* (168 U. S. 532, 558). The case at bar falls within this rule. As to the witness, Morgan, his testimony was first called out by the defendant on cross examination (R. 321, 322), and the testimony objected to was in rebuttal (R. 323, 324). As to neither witness was there the slightest evidence of influence of any sort by them exerted upon the defendant to produce the statements in question (R. 327, 328, 329).

(*i*) *Assignment 9—Indictment to jury room.*—The precise point is ruled adversely to plaintiff in error in *Holmgren* v. *United States* (217 U. S. 509, 520, 521). The record in the case at bar does not show that the defendant ever objected to the jury having the indictment.

(*k*) *Assignments 10 and 11—Use of letters of defendant.*—This point has been sufficiently dealt with under the first heading in this argument.

(*l*) *Assignments 13 and 14—Failure to charge on insanity.*—The record shows that no issue was made at the trial on this subject. The opening statement of counsel for defendant (R. 221–226) was confined entirely to self-defense, and none of the charges requested by the defendant (R. 478–482) mentioned insanity in any way. There is no testimony in the

record bearing on insanity. The court, therefore, was not bound to charge on the subject. (See *Battle* v. *United States*, 209 U. S. 36, 38.)

POINTS MADE IN BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

The inordinate length of the brief filed on behalf of the plaintiff in error, and the meticulous, if not insincere, nature of the points raised therein, make it impossible, if indeed it were worth while, to deal with all of the matters referred to therein. It is respectfully submitted to the judgment of this court whether such a brief has any tendency to enlighten the court in the decision of the cause before it. Such points as seem worthy of any attention at all are dealt with below.

The defendant can not now successfully contend that he has been placed in jeopardy in either of the two former trials. He procured the writ of error in each case, upon which the judgments against him were set aside and the case remanded for proceedings de novo. Of such waiver, this court said:

> In our opinion the better doctrine is that it does not limit the court or jury, upon a new trial, to a consideration of the question of guilt of the lower offense of which the accused was convicted on the first trial, but that the reversal of the judgment of conviction opens up the whole controversy and acts upon the original judgment as if it had never been. The accused by his own action has obtained a reversal of the whole judgment, and we see

> no reason why he should not, upon a new trial, be proceeded against as if no trial had previously taken place. We do not agree to the view that the accused has the right to limit his waiver as to jeopardy, when he appeals from a judgment against him. As the judgment stands before he appeals, it is a complete bar to any further prosecution for the offense set forth in the indictment, or of any lesser degree thereof. No power can wrest from him the right to so use that judgment, but if he chooses to appeal from it and to ask for its reversal he thereby waives, if successful, his right to avail himself of the former acquittal of the greater offense, contained in the judgment which he has himself procured to be reversed. (*Trono* v. *United States*, 199 U. S. 521, 533.)

This decision is a sufficient reply to defendant's contention that he could not legally be sentenced to death after the prior judgment of life imprisonment had been set aside, upon the reversal in the second case.

In *United States* v. *Ball*, 163 U. S. 662, 671, this court, referring to a similar contention, said:

> Their plea of former conviction can not be sustained, because upon a writ of error sued out by themselves the judgment and sentence against them were reversed, and the indictment ordered to be dismissed. How far, if they had taken no steps to set aside the proceedings in the former case, the verdict and sentence therein could have been held to bar

> a new indictment against them need not be considered, because it is quite clear that a defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offence of which he had been convicted. *Hopt* v. *Utah*, 104 U. S. 631, 110 U. S. 574, 114 U. S. 488, 120 U. S. 430; *Regina* v. *Drury*, 3 Cox Crim. Cas. 544, S. C. 3 Car. & Kirw. 193; *Commonwealth* v. *Gould*, 12 Gray, 171. The court therefore rightly overruled their plea of former jeopardy; and can not have prejudiced them by afterwards permitting them to put in evidence the former conviction, and instructing the jury that the plea was bad.

The provision of Revised Statutes 1033 that when a person is indicted for a capital offense, a list of the jurors, etc., shall be delivered to him at least two entire days before the trial, is not applicable to veniremen called upon special venire. The record in this case does not disclose an objection on the part of the defendant to proceeding with the trial until a list of the names of the 10 additional special veniremen was served upon him. Neither does it appear in the record that the defendant insisted upon such list. The right secured to the defendant under section 1033, Revised Statutes, may be waived. *Logan* v. *United States*, 144 U. S. 253, 304; *Hickory* v. *United States*, 151 U. S. 303, 308; *Johnson* v. *United States*, 225 U. S. 405, 411; *Goldsby* v. *United States*, 160 U. S. 70, 76.

However, the section last referred to is not applicable to veniremen called upon special venire for the purpose of completing the panel where the same has been exhausted by challenge or excused jurors.

As was said in the case of *Stewart* v. *United States*, 211 Fed. 41, 46 (9th C. C. A.):

> * * * The court can never know beforehand how much difficulty may be encountered in getting 12 fair and unbiased men, but, if defendant's construction of the statute is correct, then the court would be bound at its peril to have in attendance a panel sufficiently large to meet any possible contingency in that regard, for to conform to the statute literally, whenever a regular panel is exhausted, without securing a completed jury, the trial must end and be commenced de novo upon a new venire being secured, since the language of the statute is not that the names of the jurors shall be furnished two days before they are called but "at least two entire days before the trial." It is obvious that to so construe the statute would result in its being absurdly impracticable, and we are of opinion that the requirement is satisfied by furnishing a list of the regular panel of jurors in attendance at the opening of the trial. Its evident purpose is to put the defendant on an even plane with the Government in preparing for his defense by giving him the names of the attending jurors and of the witnesses to be called against him. This

purpose is accomplished when a list of the panel in attendance upon the court at the time is furnished him, since the Government can have no advantage in knowledge of the personnel of a new venire called during the trial.

CONCLUSION.

The writ of error should be denied for lack of jurisdiction, or the judgment of the court below should be affirmed.

ROBERT P. STEWART,
Assistant Attorney General.
W. C. HERRON, *Attorney.*

○

In the

Supreme Court of the United States

October Term, 1918.

No. 276.

ROBERT F. STROUD, *Plaintiff in Error*,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR REHEARING AND SUGGESTIONS IN SUPPORT THEREOF.

ISAAC R. KENDRICK,
MARTIN J. O'DONNELL,
Attorneys for Plaintiff in Error.

In the

Supreme Court of the United States

October Term, 1919.

ROBERT F. STROUD, *Plaintiff in Error,*

vs.

THE UNITED STATES OF AMERICA.

No. 276.

PETITION FOR REHEARING.

To the Honorable Supreme Court of the United States:

The plaintiff in error respectfully states that the opinion of this Honorable Court and the judgment rendered by this court in this cause on the 24th day of November, 1919, affirming the last sentence of death imposed upon said plaintiff in error in this cause is based upon certain misconceptions of the facts contained in the transcript of the record herein and of the law applicable to those facts as hereinafter more fully appears:

I.

The opinion of this court, delivered on the 24th day of November, 1919, contains the following recital:

"Certain jurors were challenged for cause upon the ground that they were in favor of nothing less than capital punishment in cases of conviction for murder in the first degree. It may well be that as to one of these jurors, one Williamson, the challenge should have been sustained. This juror was peremptorily challenged by the accused, and did not sit upon the jury. The statute in cases of this character allowed the accused twenty peremptory challenges; *it appears that he was in fact allowed twenty-two peremptory challenges.* Thus, his right to exercise peremptory challenges was not abridged to his prejudice by an erroneous ruling as to the challenge for cause. In view of this fact, and since there is nothing in the record to show that any juror who sat upon the trial was in fact objectionable, we are unable to discover anything which requires a reversal upon this ground."

The plaintiff in error respectfully states that the statement in the above quoted paragraph of said opinion to the effect that the plaintiff in error "was in fact allowed twenty-two peremptory challenges" is erroneous and is contradicted by the record in this cause.

That the numbers of the peremptory challenges allowed to defendant, together with the names of the persons peremptorily challenged and the pages of the record showing said names and pages are as follows:

No. 1.—Mr. Tanner, page 128 of the record.
No. 2.—Mr. Bracken, page 137 of the record.
No. 3.—Mr. Wallace, page 139 of the record.
No. 4.—Mr. McConnell, page 145 of the record.
No. 5.—Mr. McCloskey, page 149 of the record.
No. 6.—Mr. Williamson, page 153 of the record.
No. 7.—Mr. Lowery, page 156 of the record.
No. 8.—Mr. Stewart, page 159 of the record.
No. 9.—Mr. McGregor, page 170 of the record.
No. 10.—Mr. Talbott, page 176 of the record.
No. 11.—Mr. Dean, page 178 of the record.
No. 12.—Mr. Postal, page 181 of the record.
No. 13.—Mr. M. D. Eglin, page 182 of the record.
No. 14.—Mr. Nelson, page 184 of the record.
No. 15.—Mr. Harpsberger, p. 186 of the record.
No. 16.—Mr. Kinsley, page 188 of the record.
No. 17.—Mr. Wright, page 192 of the record.
No. 18.—Mr. Hill, page 198 of the record.
No. 19.—Mr. Miller, page 208 of the record.
No. 20.—Mr. Hayes, page 211 of the record.

That the erroneous conclusion of the trial judge shown on pages 208 and 210 of the record does not warrant the statement in the brief of the Government (by which this court has been misled) or the statement in the opinion of this court to the effect that the defendant was allowed twenty-two (22) peremptory challenges. Said statements on pages 208 and 210 of the record follow:

> "The Court: Have you had twenty challenges, gentlemen?
>
> Mr. O'Donnell: Mr. Andres said last night he had eighteen.
>
> The Court: I have twenty; according to my record it is twenty, but if you are in doubt about it I prefer to give you another challenge. (208)"

Plaintiff in error then peremptorily challenged Mr. Miller. Thereafter, on page 210, the following appears:

> "Mr. O'Donnell: How many challenges does the court hold we have exercised?
>
> The Court: According to my tally you have exercised twenty-one. What is your check, Mr. Harvey?
>
> Mr. Harvey: Twenty-one.
>
> Mr. Kimbrell: Will the court permit us according to Mr. Andre's count, to challenge one more man?
>
> The Court: I have no objection to your having *one more* out of the abundance of caution, *one more*."

Plaintiff in error then peremptorily challenged Mr. Hays. Mr. Coons was then examined, and thereupon one of the counsel for plaintiff in error inquired of the trial court:

> "Mr. O'Donnell: * * * That exhausts the challenges, I understand?"

To this question the court responded, *"Yes."*

This is shown on page 212 of the record.

The plaintiff in error respectfully states that it appears from said pages of the record that the trial judge conceded that his calculation, check or tally, as to the number of peremptory challenges allowed to plaintiff in error, was incorrect and that he depended upon the counsel for the Government and for defendant rather than upon his own ability to keep a correct check and that the opinion of this court reciting that plaintiff

in error had twenty-two challenges has no basis other than a conclusion of the trial judge, *which was later abandoned by the trial judge* and upon which *the said trial judge placed no reliance and made no decision,* and that said conclusion is directly contradicted by the record showing the names and number of persons who were peremptorily challenged by the defendant.

And plaintiff in error respectfully directs the attention of this court to page 486 of the printed transcript of the record herein, from which it appears that the United States attorney for he District of Kansas appended his signature to the Bill of Exceptions on the 29th day of November, 1918, and asserted over his signature that the Bill of Exceptions incorporated in the printed transcript of the record before this court, "is a *full,* true and correct Bill of Exceptions," and that upon the said written consent of the said district attorney the trial judge thereafter, on the 5th day of December, 1918, signed said bill of exceptions, "to all and singular the acts, orders and rulings of the court in the premises," and ordered that same be filed and made a part of the record in the cause.

And plaintiff in error respectfully states that the application of the rule of law which made the ruling of the trial court on the challenge for cause to the juror Williamson reversible error also made a like ruling on the challenge for cause to the juror Irving Hill reversible error. The following answers of said Hill show that he was not impartial on one of the issues arising on the indictment, to-wit, the measure of punishment. His

answers on the *voir dire* examination show that if he concluded the defendant was guilty of first degree murder *he would vote for capital punishment as a duty* and that he favored that punishment in first degree murder cases. Said answers follow:

> "Q. Have you in your mind any conscientious scruples that would keep you from being perfectly free in favor of either form (death or life penalty) as the facts might justify? A. I can vote for either form. *I doubt if I could answer your question that I am perfectly free.*
>
> Q. You mean by that that you have a feeling of preference one way or the other in the matter? A. *I have.*
>
> Q. Which way? A. *I am most favorable to capital punishment.*
>
> Q. You favor it in case of first degree murder. A. Yes. *If I concluded he was guilty of first degree murder I would vote for capital punishment as a duty,* not as an opportunity. * * * *As a preference I would vote for capital punishment* (195-198)."

And plaintiff in error respectfully states that the rulings of the trial court on the examination of the panel caused the jury actually selected to believe that they could not conscientiously perform their duty unless they imposed the death penalty, adopted the system aforesaid for impaneling the jury and thus and thereby, in violation of the law as laid down by this court in *Lewis* v. *United States,* 146 U. S. 370; *St. Clair* v. *United States,* 154 U. S. 148; *Pointer* v. *U. S.,* 151 U. S. 408, and *Shaie* v. *Railway,* 157 U. S.

348, not only embarrassed but prevented "the full, unrestricted exercise by the accused of the right of peremptory challenge."

And plaintiff in error respectfully states that the erroneous rulings of the trial court in refusing to sustain his challenges for cause to said Williamson and Hill and in limiting his peremptory challenges to twenty, as shown herein, compelled defendant to exhaust two of the peremptory challenges allowed to him by law to his prejudice, so that said defendant *was in fact allowed only eighteen free and untrammeled peremptory challenges* and was compelled to use the two additional peremptory challenges grudgingly allowed by the trial court to exclude Williamson and Hill from the panel who testified on their *voir dire* examination that they were not free to exercise their discretion to qualify their verdict in this case in accordance with the provisions of Section 330 of the Penal Code.

And plaintiff in error respectfully states that the system adopted by the United States Court for the District of Kansas for impaneling juries in first degree murder cases is a system adopted by said court designedly and intentionally for the purpose of unduly influencing the jury actually selected to impose the death penalty, which said system was followed in other such cases in said district as in the case at bar and has been discovered by the Circuit Court of Appeals for the Eighth Circuit, in the case of *Manuel* v. *U. S.*, 254 Fed. 272, to violate the rights of a defendant on trial for first degree murder in said district under the statute (Sec. 330, Cr. Code) authorizing

jurors in such cases to qualify their verdicts. That the rulings of the trial court during the examination of the panel, in the presence of the jury actually selected, in excluding on its own motion and on the Government's challenge, all jurors who manifested the slightest doubt of the wisdom of imposing the death penalty in first degree murder cases *and in overruling defendant's challenges for cause to jurors who swore that they would vote for the death penalty only* operated to unduly influence and to deny to the accused "the full and free exercise by the jury of powers newly conferred upon them by statute in this matter" and the opinion herein demonstrates that that "full and free exercise" has not been in this instance "upheld and guarded by this court as against the possible effect of any restriction or omission in the *rulings* and instructions of the judge presiding at the trial," and that the quoted rule in this regard, recognized in *Winston* v. *United States*, 172 U. S. 303, has been wholly disregarded by this and the trial court in this case.

And plaintiff in error respectfully states that if this Honorable Court should be so ill-advised as to permit the judgment of affirmance, based upon the foregoing quoted paragraph of its opinion delivered herein to stand, the plaintiff in error will be hanged by the neck until he is dead, and this because in this case this Honorable Court has failed to examine the record on which its opinion is based and thereby approved the action of the trial court in erroneously barring the plaintiff in error "of a principal matter concerning his trial," contrary to the Constitution and laws

of the United States and the decisions of this court.

And plaintiff in error respectfully states to this Honorable Court that his life depends upon its performance of its duty to diligently, fairly and impartially exercise the appellate jurisdiction vested in it by the Constitution of the United States, to the end that neither plaintiff in error nor any other person shall be deprived of his life except in the manner provided by law, after his right to all the peremptory challenges allowed him by law has been fully and freely recognized, and to the end that the right of the plaintiff in error or any other person to a fair and impartial trial in accordance with the forms of law shall not depend upon whether this Honorable Court should inadvertently misrecite the facts in the record before it or fail to diligently and fairly discharge and perform its solemn duty in a matter involving human life.

And plaintiff in error respectfully prays the court to examine the affidavit of one of his attorneys attached hereto, from which it appears that the record herein shows that the number of peremptory challenges allowed to plaintiff in error *was not twenty-two*, as the opinion recites, *but twenty*, and that of these twenty the plaintiff in error was compelled to exercise two to exclude Williamson and Hill from the jury by the erroneous ruling of the trial court in twice in each case overruling the defendant's challenges for cause to said Williamson and Hill (See pp. 143 and 153 for challenges to Williamson and 195 and 198 for challenges to Hill), so that defendant

was allowed *only eighteen peremptory challenges* and was prevented by the court from freely challenging the number allowed by law.

State of Missouri, County of Jackson—ss.

Martin J. O'Donnell, being duly sworn upon his oath, states that he is one of the attorneys in the above entitled cause and was one of the attorneys who represented the plaintiff in error at the trial of the above entitled cause.

Affiant further states he has examined a copy of the printed transcript of the record, in this court and cause, and that said record contains the names of all of the members of the panel peremptorily challenged by the plaintiff in error and that the numbers, names and pages of the record showing the peremptory challenges exercised by and allowed to plaintiff in error at the trial are as follows:

PAGE

No. 1—Mr. Tanner.....128 of the record
No. 2—Mr. Bracken.....137 of the record
No. 3—Mr. Wallace.....139 of the record
No. 4.—Mr. McConnell.....145 of the record
No. 5.—Mr. McCloskey.....149 of the record
No. 6.—Mr. Williamson.....153 of the record
No. 7.—Mr. Lowery.....156 of the record
No. 8—Mr. Stewart.....159 of the record
No. 9—Mr. McGregor.....170 of the record
No. 10—Mr. Talbott.....176 of the record
No. 11—Mr. Dean.....178 of the record
No. 12—Mr. Postal.....181 of the record
No. 13—Mr. M. D. Eglin.....182 of the record
No. 14—Mr. Nelson.....184 of the record

No. 15—Mr. Harpsberger. . . .186 of the record
No. 16—Mr. Kinsley. . . . . .188 of the record
No. 17—Mr. Wright. . . . . .192 of the record
No. 18—Mr. Hill . . . . . .198 of the record
No. 19—Mr. Miller. . . . . .208 of the record
No. 20—Mr. Hayes. . . . . .211 of the record

And affiant further states, as shown in said record, the plaintiff in error was compelled to use two of the said twenty peremptory challenges for the purpose of excluding Elmer Williamson and Irving Hill from the jury, and that said plaintiff in error was therefore allowed to freely exercise his right only to eighteen of his peremptory challenges in accordance with the law.

And affiant further states that no peremptory challenges, other than the twenty above mentioned, were allowed to plaintiff in error at the trial of this cause.

And further affiant saith not.

. . . . . .

Subscribed and sworn to before me, a notary public, this ....day of December, 1919.

. . . . . .

Notary Public.

My commission expires

II.

And plaintiff in error further states that this Honorable Court has overlooked the sixth assignment contained in the Assignment of Errors filed herein, from which it appears that the trial court in its charge to the jury limited the jury (in considering the issue of self-defense) to the testi-

mony of the witnesses called to the stand by the defendant, and by said charge prevented the jury on the issue of self-defense from giving effect to the presumption of innocence and from considering the fact that the government failed to call any witnesses to the stand who was looking toward the accused and deceased at the beginning of the struggle which resulted in the death of the deceased and also prevented the jury from considering that part of the testimony of the witnesses called to the stand by the government, *which tended to sustain the issue of self-defense.*

That the language of said charge, with the exception on the part of the plaintiff in error thereto, is shown on page 492 of the record and plaintiff in error respectfully shows to the court that the statement on page 21 of the brief filed on behalf of the government calling attention to a portion of the charge other than that complained of in the sixth assignment of error, which latter portion directed the jury to consider the testimony both on behalf of the government and on behalf of the defendant in determining who made the first assault does not correctly state the law as applied to the facts in this case under the decisions of this court in *Mills* v. *U. S.*, 164 U. S. 644; *Brown* v. *U. S.*, 164 U. S. 221, and *Bird* v. *U. S.*, 180 U. S. 356, from which decisions it appears that where a trial court in a criminal case incorrectly declares the law applicable to an issue in a cause on trial in one portion of a charge to the jury, or in one instruction to the jury, and correctly declares the law in another, the Appellate Court cannot determine whether the jury fol-

lowed the correct or incorrect portion of the charge, and for this reason reversible error was committed at the trial.

And plaintiff in error respectfully prays the court to examine the testimony of the following named witnesses called by the government, to-wit: E. E. Whitlach (278), Howard Beck (284) and William James Pollard (307), together with that of Miss Elizabeth La Bar, the court reporter (402-407), from which it appears that testimony was adduced by witnesses called by the government tending to substantiate the issue of self-defense, and to examine the charge of the court on page 474 of the record, by which it appears that the court expressly declared to the jury that the issue of self-defense could be supported only by the testimony of the witnesses called to the stand by the defendant; that the especially erroneous part of the charge is as follows:

> "But the question for your determination on that plea (self-defense) and that principle of law is whether or not *you will accept the testimony of the defendant's witnesses* as disclosing as true facts at that time."

III.

And plaintiff in error respectfully states that the case of *Logan* v. *U. S.*, 144 U. S. 263, cited by the government in support of its contention that the trial court did not err in sustaining challenges for cause interposed by the government to jurors who were opposed to capital punishment, either as a policy or because of conscientious scruples, was decided in the year 1892, and five years before that

the statute authorizing the jury to qualify their verdict was enacted and consequently is not authority for the contention of the government or the opinion of the court herein. The weight of authority construing kindred statutes have held that the State has no right to a trial by jurors who have no objection against inflicting the death penalty, except as it can secure them by challenging peremptorily those who have such objections and that it is reversible error to sustain the government's challenge for cause to a juror on that ground under such a statute (*State* v. *Lee*, 91 Ia. 499; *State* v. *Garrington*, 11 S. D. 178).

IV.

And plaintiff in error respectfully states that this Honorable Court, by holding that the constitutional provision, "nor shall any person for the same offense be twice subject to jeopardy of life," protected plaintiff's life if he had been content to remain in prison during the remainder of his life under the confessedly unjust judgment reversed by this court in this cause on the 4th day of February, 1918, has written an amendment into the Constitution and to the statutes authorizing an accused to prosecute a writ of error which it was without jurisdiction or lawful authority to write; that it has made the jeopardy of the Constitution the subject of barter and has, in this case, in contravention of principles of constitutional interpretation heretofore recognized by it granted justice to plaintiff in error on the 4th day of February, 1918, when it reversed the confessedly unjust judgment by which plaintiff's life was protected, and accepted the life of plaintiff in error

in exchange therefor on the 24th day of November, 1919, when it affirmed the judgment of death.

V.

And plaintiff in error respectfully states that the decision of this Court in approving the ruling of the trial court on the motion to quash the jury panel is contrary to the current of authority on the question (*Allen* v. *U. S.*, 115 Fed. 3; *Bowman* v. *State*, 19 Neb. 523; *People* v. *Moyer*, 77 Mich. 571; *People* v. *Willard*, 92 Cal. 482; *People* v. *Wood*, 126 N. Y. 429), in that the opinion herein has committed the question as to whether or not a defendant on trial for life in a Federal Court shall have a fair and impartial trial before an impartial jury solely to the discretion of the trial court.

And plaintiff in error respectfully states that his condition as a convict already in the penitentiary for homicide necessitated greater care on the part of the trial court in the selection of the jury than if the plaintiff in error had never before been convicted of an offense.

Wherefore, plaintiff in error respectfully prays the court to set aside its judgment of affirmance herein and to grant him a rehearing of this cause.

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We certify that the above motion is not made for purposes of delay.

ISAAC B. KIMBRELL,
MARTIN J. O'DONNELL,
Attorneys for Plaintiff in Error.

Kansas City, December 30, 1919.

SUGGESTIONS IN SUPPORT OF PETITION FOR REHEARING.

I.

As To Peremptory Challenges.

"To bar the party indicted of his lawful challenge is to bar him of a principal matter concerning his trial." (3 Inst. 27, C. 2.) Defendant's right to exercise peremptory challenges was abridged to his prejudice by an erroneous ruling as to his challenge of Williamson for cause for the reason that the trial court allowed only *twenty* peremptory challenges and not *twenty-two*, as this court erroneously asserts in its opinion. It will be noted that the trial judge did not assert that his check was correct. That he did not rely on his own calculation is evidenced by the question on page 208 of the record.

> "The Court: Have you had twenty challenges, gentlemen?"

On page 210, in response to the question, "How many challenges does the court hold we have exercised?" the court responded: "According to my tally you have exercised twenty-one. What is your check, Mr. Harvey?" It appears that the court did not rely on his own check or tally. The question as to the number actually allowed must therefore be determined by consulting the pages of the record showing the names of the persons challenged.

The trial court adopted a system for impaneling the jury which not only embarrassed but prevented the full, unrestricted exercise by the accused of his right of peremptory challenge. It adopted a system by virtue of which it sustained all the Government's challenges for cause to members of the panel who were opposed to capital punishment, either as a policy or conscientiously or excused such persons on its own motion over defendant's exception (even though they stated in many instances that they would in proper circumstances vote for the death penalty) and overruled all of the accused's challenges for cause to persons who testified that in a first degree murder case they would never vote for life imprisonment. To get these latter off the panel the defendant was compelled to exercise his peremptory challenges. Williamson and Hill manifestly were prejudiced against defendant and were not impartial on the measure of punishment. The opinion holds that the challenge for cause should have been sustained as to Williamson, but that the error was cured because it mistakenly concluded that twenty-two challenges were granted to the accused. This conclusion or statement of fact is flatly contradicted by the record, which imports absolute verity.

Discussing the right of peremptory challenge, this court has said:

> "The right of peremptory challenge comes from the common law with the trial by jury itself and it has always been essential to the fairness of trial by jury. As was said by Blackstone and repeated by Mr. Justice Story:

> 'In criminal cases or *at least in capital ones*, there is *in favorem vitae* allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all, which is called peremptory challenge; a provision full of that tenderness and humanity to prisoners for which our English law is justly famous." (*Lewis* v. *United States*, 146 U. S. 376.)

> "One of the most effective means to free the jury box from men unfit to be there is the exercise of peremptory challenge." (*Hays* v. *Missouri*, 120 U. S. 68.)

This court has said that:

> "Any system for the impaneling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of the right of peremptory challenge must be condemned." (*St. Clair* v. *U. S.*, 154 U. S. 148; *Pointer* v. *U. S.*, 151 U. S. 408.)

Even in a case where only a small amount of the money of a railroad company was involved the court said that

> "to impanel a jury in violation of law and in such a way as to deprive a party of his right to peremptory challenge constitutes reversible error is clear." (*Shane* v. *Ry.*, 157 U. S. 348.)

We think that the court should as impartially apply the legal rules where a litigant's life is involved as in a case where a paltry sum of a railroad companys' money hangs in the balance.

The law will presume prejudice in a case where the court refused to sustain defendant's challenge for cause and defendant was compelled to use his peremptory challenges to exclude a juror properly challenged for cause where before the jury was sworn the peremptory challenges were exhausted (*People* v. *Weil*, 40 Cal. 268; *Trenor* v. *Ry. Co.*, 50 Cal. 22; *Nubbard* v. *Rutledge*, 57 Miss. 7; *State* v. *Brown*, 15 Kan. 400). This for the very plain reason that the act of the court in refusing to sustain a challenge for cause and thereby compelling the defendant to use his peremptory challenges to exclude a juror, necessarily, by this conduct, denies to defendant that peremptory challenge which the law allows as his absolute right. (See *Bales* v. *State*, 13 Smed. & M. 398; *Williams* v. *State*, 32 Miss. 390; *Finn* v. *State*, 5 Ind. 400; *Van Blaricum* v. *People*, 16 Ill. 364.)

We respectfully direct the attention of the court to the consideration that respect for law and the administration of justice would be seriously impaired if the defendant should be executed because of the inadvertent omission on the part of the court to examine the record and correctly recite the facts therein contained in its opinion.

II.

As To Erroneous Charge.

The portion of the charge excepted to (see Sixth Assignment of Error, R. 491-492) limited the jury to the consideration of the testimony of the witnesses called to the stand by the defendant

and prevented the jury from considering the testimony of the witnesses called to the stand by the Government, together with the fact that the Government failed to call those witnesses who were facing the scene of the tragedy when the struggle began and also the other facts and circumstances in the case, including the presumption of innocence. The vice of the portion of the charge complained of is epitomized in the following language:

> "But the question for your determination on that plea and that principle of law is whether you will accept the testimony of the *defendant's witnesses* as disclosing the true facts at that time." (R. 474.)

The foregoing was the peroration of the portion of the charge dealing with the issue of self-defense.

The court thereafter commented on the testimony offered by the Government and then proceeded:

> "And in that connection, in determining whether or not Turner made the first assault upon Stroud with his club, you will consider not only all of the testimony by all of the witnesses in the case, both on behalf of the Government and on behalf of the defendant." (R. 474.)

On page 21 of the Government's brief, the contention is made that the latter portion of the charge cured the error in the first portion. But this court has held differently in the case of *Mills*

v. *U. S.*, 164 U. S. 644. In that case the court said:

> "—in a case where the life of the defendant is at stake, we feel that it is impossible to let him be executed in consequence of a conviction by a jury under a charge of the court which, we think, in some of its features was clearly erroneous in law because not full enough on the subject herein discussed, even though in some parts of the charge a more full and correct statement of the law was given; *which of the two statements was received and acted upon by the jury, it is wholly impossible for this court to determine.*"

The same principle was applied in *Dr. J. H. M'Lean Medicine Co.* v. *U. S.*, 253 Fed. 694, where it is said:

> "Other portions of the charge correctly stated the rule as to the good faith of defendant, but did not purport to cure the error for the jury were at liberty to follow the erroneous portion of the instructions."

In *Bird* v. *U. S.*, 180 U. S. 356, this court held that a charge failing to require the jury to consider *the defendant's* evidence on the issue of self-defense was erroneous. Herein the portion of the charge complained of failed to require the jury to consider the testimony of the Government's witnesses tending to exculpate the defendant and excluded the same from their consideration by emphatically telling them that:

> "the question for your determination on that plea (self-defense) and that principle of

> law is whether you will accept the testimony of the *defendant's* witnesses as disclosing the true facts at that time."

As this was the *only defense* submitted to the jury, the defendant had "a right to a full statement of the law from the court," and "a neglect to give such statement * * * is sufficient for reversal." (*Bird* v. *U. S.*, 180 U. S. 356.) We respectfully submit that the only way in which the opinion of this court in ignoring this palpable error can be justified is to assume that it has itself a right to determine the issues of fact and conclude that defendant was not entitled to a trial in accordance with the time-honored legal rules.

III.
Concerning Former Jeopardy.

The court, commenting on the jeopardy provision of the Constitution, in *Kepner* v. *U. S.*, 195 U. S. 100, said:

> "In ascertaining the meaning of the phrase taken from the Bill of Rights, it *must be construed with reference to the common law* from which it is taken."

It also cited 1 Kent Com. 336; *U. S.* v. *Wong Kim Ark*, 169 U. S. 469; *Minor* v. *Happersett*, 21 Wall. 162; *Ex parte Wilson*, 114 U. S. 417; *Boyd* v. *U. S.*, 116 U. S. 616; *Smith* v. *Alabama*, 124 U. S. 465; Interstate Com. Rep. 804; *Moore* v. *United States*, 91 U. S. 270, 274, and *United States* v. *Gibert*, 2 Sumn. 39 Fed. Case No. 15209.

Justice Story's *resumé* of the common law decisions and authorities on the question in *U. S.* v. *Gibert* demonstrates what the common law was. The decisions of the English courts since Story's day in *Reg* v. *Bertrand*, 10 Cox. C. C. (1865); *The Queen* v. *Murphy*, 38 L. J. 53 (1869); *Reg* v. *Melior*, 27 L. J. M. C. 121; Dears & B. 468; *The King* v. *Dyson*, 2 K. B. 454 (1908), "The Court of Criminal Appeal," p. 4, by Ross (1911), show that according to the common law the accused, by appealing, does not waive, nor has the appellate court jurisdiction to deny him, the benefit of the plea of former jeopardy and demonstrate that the people of England have never disturbed the ancient landmarks on this question.

The Criminal Appeal Act authorizes the appellate court in England to hear additional evidence on the appeal of the accused, even as the statute authorized the Philippine court in the Trono case, 199 U. S. 521, to examine the record anew and increase the sentence and this does not constitute second jeopardy but its provisions are analogous to the statutes authorizing an accused to prosecute a writ of error to this court and the chief justice of England, with concurrence of all the judges and the Privy Council, has held that there can be no new trial after reversal on appeal.

On page 4 of "The Court of Criminal Appeal," *supra*, it is said:

> "The court *does not possess the power of ordering a new trial* * * * though in a particular case there may be evidence which seems to show that the appellant was guilty of the offense charged and might properly

> have been convicted of it but for something which constrains the court to quash the conviction, the court has no *alternative but to allow the appellant to go free.*"

Today the English courts which draw their principles of justice from the pure fountain of the common law construe the common law maxim as it was construed before Story's day and hold that the maxim prohibits a second trial and that the prosecution of an appeal does not waive the jeopardy.

The splendid system of government and the social fabric which has grown up in the British Empire by virtue of the application of the general principles of the common law should afford demonstrative proof that the disturbance of the ancient landmarks of that common law is not necessary to the maintenance of our latter day western civilization. This court has written something into the Constitution which was not put there by the fathers, either directly or by implication. It has written something into the statutes allowing the accused a writ of error in cases such as that at bar, which the Congress did not write therein. It has not only put the constitutional provision on the judicial auction block for barter and sale, so that he whose life is protected may sell that protection in exchange for justice, but it has also ignored another maxim of the common law which commands that justice be not bought or sold. For in this case when it did justice to defendant by reversing the former confessedly unjust judgment, that award of justice

was conditional upon surrender of that which protected him from peril of his life, and consequently the *quid pro quo* was defendant's life.

With the concurrence of the present chief justice and Mr. Justice Harlan, Mr. Justice McKenna, in *Trono* v. *U. S.*, 199 U. S. 521, said:

> "An accused would not purposely and consciously appeal from an acquittal from a grave crime and cast from himself the immunity that such an acquittal gives him. Let it be remembered that we are dealing with a great right—I may even say a Constitutional right—for the opinion of the court discusses the case as though it were from a Circuit Court of the United States. Should such a right be narrowly or grudgingly considered? Should it be put in balance with other rights and lost by their exercise? I think that the guaranties of constitutions and laws should not be so construed. The life and liberty of the citizen are precious things, precious to the State as to the citizen, and concern for them is entirely consistent with a firm administration of criminal justice. I submit that the State seeks no convictions except in legal ways and because it does not it affords means of review of erroneous rulings and judgments and freely affords such means. It does not clog them with conditions and forfeit by their exercise great and constitutional rights. Yet in my judgment such is the effect of the decision just rendered. The opinion says that the accused takes up the whole record for review. He thereby waives the benefit of the provision (once in jeopardy) for the purpose of attempting to gain what he thinks is a greater benefit, viz: A review and reversal by the higher court

> of the judgment of conviction. I repeat again that *constitutional guaranties and remedies should not be put in such barter;* that a defendant should not be required to give up the protection of a just (it must be so regarded for the sake of the argument) acquittal of one crime as the price of obtaining a review of an unjust conviction of another crime."

The life of the accused herein on the morning of the 4th day of February, 1918, was protected by the verdict finding him "guilty as charged in the indictment without capital punishment." That verdict was unjustly obtained in that the prosecuting officers of the government procured pardons for convicts and used them as witnesses for the government and then shut out the testimony of those convicts, on whom the accused relied to establish his defense, by invoking the now discarded common law rule which rendered felons incompetent to testify (*Rosen* v. *U. S.*, 245 U. S. 467). The United States, through its solicitor general, admitted in this court that to imprison the accused for the term of his natural life on that verdict would be unjust, and this court decided accordingly. But this court did not grant him that justice freely. It attached a condition to the grant. It put the constitutional guaranty in barter. It sold the accused justice on the 4th day of February, 1918, and accepted his life in exchange on the 24th day of November, 1919. In trading the justice for the life it violated the maxim of the common law commanding that justice be not bought or sold. In-

stead of looking to the common law as its guide to ascertain the meaning of the jeopardy maxim of the Constitution, the court has looked to the majority opinion in the Trono case and that was a case controlled by the principles of the Spanish law rather than the common law. The Trono case, as Mr. Justice McKenna points out, is based upon the barter and sale theory and so is the opinion herein. It is a sad commentary on our law that notwithstanding the jeopardy provision, an accused whose life is protected by former jeopardy cannot have justice except at peril of his life. The court in the Kepner case looked to the common law for the meaning of the jeopardy provision. In the Stroud case the court looked to the Spanish law. Stroud, relying on the statement of the court in the former case that the court would accord him justice according to the principles of common law (without barter, exchange or disturbance of the ancient landmarks), asked to be relieved from the former confessedly unjust judgment. To his sorrow, he finds that when the court in the Kepner case and other cases solemnly announced that it would look to the common law to ascertain the meaning of the jeopardy phrase, it was merely paltering with the words of the Constitution in that double sense "which speak the words of promise in the ear and break it to the hope."

The verdict (of 1917) reversed on February 4, 1918, was in defendant's favor on the issue of punishment. On that issue the jury found that his life should not be forfeited. This was its affirmative finding. It acquitted the accused of the variety of crime for which his life could be

forfeited. This acquittal this court says that the accused (impliedly) purposely and consciously cast from him and incidentally the immunity which that acquittal gave him. The ruling in this case operates to render the words of the fifth amendment, "Nor shall any person for the same offense be twice subject to jeopardy of life," wholly superfluous. This decision makes it a sort of vermiform appendix in the Constitution for the very simple reason that the doctrine of *res judicata* constitutes a complete protection in every case where either the government or a private citizen seeks to place any person on trial a second time for his liberty, whether he has been convicted or acquitted. This court has affirmed the proposition that the principle of *res judicata* controls criminal as well as civil cases (See *United States* v. *Oppenheimer*, 242 U. S. 85; *Coffey* v. *U. S.*, 116 U. S. 436; *Frank* v. *Mangum*, 237 U. S. 309). So that only cases such as that at bar necessitate the invocation of the jeopardy provision.

The English courts have similarly decided (*The Queen* v. *Miles*, 242 B. D. 423-431; *Brittain* v. *Kinnaird*, 1 Brad & B. 432), and so has the court in *Commonwealth* v. *Ellis*, 160 Mass. 165.

In *Queen* v. *Miles*, 2 Q. B. 423, the court said:

> "Who ever heard of a new action prevailing after a verdict and judgment for damages for the same cause of action simply on the ground that the damages were insufficient or that the conduct of the defendant was since the verdict and judgment discovered to be

more malicious than it was deemed to be at the trial."

In *United States* v. *Oppenheimer*, 242 U. S. 85, this court said:

> "Upon the merits of the proposition of the government is that the doctrine of *res judicata* does not exist for criminal cases except in the modified form of the fifth amendment that a person shall not be subject for the same offense to be twice put in jeopardy of life or limb, and the conclusion is drawn that a decision upon a plea in bar cannot prevent a second trial when the defendant never has been in jeopardy in the sense of being before a jury upon the facts of the offense charged. It seems that the mere statement of the proposition should be its own answer. It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt. It cannot be that a judgment of acquittal on the ground of the statute of limitations is less a protection against a second trial than a judgment upon the ground of innocence or that such a judgment is any more effective when entered after a verdict than if entered by the government's consent before a jury is empaneled.
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> * * * * * * *
>
> We may adopt in its application to this case the statement of a judge of great experience in the criminal law: 'Where a criminal charge has been adjudicated upon by a court having jurisdiction to hear and determine it, that adjudication, whether it takes the form of acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in

bar to any subsequent prosecution for the same offense. * * * In this respect the criminal law is in unison with that which prevails in civil proceedings.' Hawkins, J., in *The Queen* v. *Miles*, 24 Q. B. D. 423-431: The finality of a previous adjudication as to the matters determined by it is the ground of decision in *Commonwealth* v. *Ellis*, 160 Mass. 165; *Brittain* v. *Kennaird*, Brad. & B. 432. Seemingly the same view is taken in *Frank* v. *Mangum*, 237 U. S. 309, 334, as it was also in *Coffey* v. *U. S.*, 116 U. S. 436, 445.

The safeguard provided by the Constitution against the gravest abuses has tended to give the impression that when it did not apply in terms there was no other principle that could. But the Fifth Amendment was not intended to do away with what in the civil law is a fundamental principle of justice (Jeber vs. Nevit, 22:352-364) in order, when a man has been once acquitted on the merits to enable the Government to prosecute him a second time."

IV.

The fact that plaintiff in error was a convict did not deprive him of a right to a fair and impartial trial.

The opinion herein holds that though the trial court was guilty of misconduct in its remarks in the presence of the panel on the 23d day of May, 1918, in approving the misconduct of the district attorney in the presence of the panel, yet that the trial judge was competent to determine whether or not that misconduct was prejudicial, and that the whole matter was confided to the discretion

of the trial judge. We think that the fact that the defendant was a convict already serving a sentence for homicide must necessarily have influenced the decision of the trial court and this Court on this question.

We respectfully call the Court's attention to the decision in *Allen* v. *U. S.*, 115 Fed., page 3, l. c. 12, where the court has pointed out that even a convict is entitled to a fair and impartial trial:

> "All men stand equal before the law, and have the same constitutional rights and privileges. The high and the low, the poor and the rich, the criminal and the law abiding, when indicted and accused of crime, are entitled, under the law, to a fair and impartial trial. This is a sacred boon guaranteed to every person, and of which no one should ever be deprived. The law, in its extended reach, power and influence, is as tender of the rights of the man who is supposed to be bad as it is of the liberties and rights of the man who is believed to be good. The trial of every man should be free from undue prejudice or odium, especially upon the part of all officers clothed with the power and charged with the duty of administering the law in such a manner as to reach the ends of justice and of right.
>
> As was said by Whitman, J., in *State* v. *Pierce*, 8 Nev. 291, 304:
>
> 'No technicality, except by the express letter of the law, should ever deprive an accused person of a substantial right. If * * * such rule confers in this special case a benefit on one unworthy the answer is: The law knows no person; it is not made for the individual man, but for men. As the dew of

heaven falls, so it bears alike upon the just and unjust.'

Mr. Lawson, in his work on Presumptive Evidence (at page 481), declares the law in relation to the question we are discussing by propounding a question and answering it, as follows:

'Suppose the general character of one charged with crime is infamous and degraded to the last degree; that his life has been nothing but a succession of crimes of the most atrocious and revolting sort—does not the knowledge of all this inevitably carry the mind in the direction of a conclusion that he has added the particular crime for which he is being tried to the list of those that have gone before? Why, then, should not the prosecutor be permitted to show facts which tend so naturally to produce a conviction of his guilt? The answer to all these questions is plain and decisive. The law is otherwise. It is the law that the prisoner shall be presumed innocent until his guilt is proved. This rule is said by Mr. Stephen (Steph. Dig. Ev., Note 6, p. 195) to be one of the most characteristic and distinctive features of the English criminal law, preventing, as it does, a man charged with a particular offense from having either to submit to imputations which, in many cases, would be fatal to him, or else to defend every action of his own life in order to explain his conduct on the particular occasion when the act was committed with which he is charged. It is this rule which, perhaps, more than any other rule of our criminal law, distinguishes the American and English modes of conducting a criminal trial from the continental.'"

We respectfully submit that the question as to whether or not a defendant in a particular case should have a fair and impartial trial should not be submitted to the discretion of the trial judge, and in this connection we call attention to the remarks of the chief justice of the Court of Common Pleas in the trial of Hindson and Kersey, viz.:

> "The discretion of a judge is the law of tyrants; it is always unknown; it is different in different men; it is casual, and depends upon constitution, temper, passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly and passion to which human nature is liable."

Conclusion.

That the trial court *did not allow twenty-two peremptory challenges*, as stated in the opinion herein is shown by the foregoing and demonstrated by the record. The trial court erroneously sought to count out the defendant's life and had defendant's counsel trusted its mathematical accuracy as this court has approved its judicial accuracy it would have succeeded. *Twenty only was the number of peremptory challenges allowed.* But, by erroneously ruling on the challenges for cause to Williamson and Hill, the trial court compelled defendant to use two of the peremptory challenges allowed by law and, consequently, defendant's right to peremptory challenges was abridged to his prejudice so that the right to *only eighteen peremptory challenges* was fully and freely permitted.

Should this court permit the defendant to be executed after having been fully advised of the foregoing reversible errors in this cause then its decision can only be justified by the recognition of a new principle controlling the administration of criminal justice. That is, that in "hard cases," the Government is justified in putting a man to death, even though his conviction has been obtained by ignoring his right to a fair trial. The recognition of such a principle by this Honorable Court must inevitably result in placing the Federal courts in criminal cases in the same category as the English courts of the days of Elizabeth in cases of treason were placed by Hallam when he said (Hallam's Const. Hist., Chap. V, Vol. 1):

> "I have found it impossible not to anticipate in more places than one some of those glaring transgressions of natural as well as positive law that rendered our courts of justice in cases of treason little better than the caverns of murderers. Whoever was arraigned at their bar was almost certain to meet a virulent prosecutor, a judge hardly distinguishable from the prosecutor except by his ermine, and a passive, pusillanimous jury."

We urge these considerations with the utmost respect to the court but to the end that its attention may be called directly to what we consider reversible errors and to obviate the danger ever confronting the court and the nation that it may succumb to the temptation "to let a hard case make bad law."

We respectfully submit that the motion for rehearing should be granted, the judgment of affirmance set aside, the judgment of the trial court reversed and the defendant discharged.

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